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ABSTRACT

In June 2002 the U.S. Secretary of Education established the Secretary's Commission on Opportunities in Athletics. The purpose of the 15-member Commission was to collect information, analyze issues, and obtain broad public input directed at improving the application of current federal standards for measuring equal opportunity for men and women and boys and girls to participate in athletics under Title IX of the Education Amendments of 1972. The Commission held six public meetings to address the questions posed by the Secretary of Education about Title IX and the Department of Education's enforcement standards. Testimony from more than 50 expert witnesses and public comment from parents, athletes, and administrators of elementary and secondary schools, colleges, and universities were supported by document reviews to develop 23 key recommendations to ensure equal opportunities in athletics. These 23 recommendations, 15 of which were approved unanimously by Commission members, can be grouped into four thematic categories: (1) commitment; (2) clarity; (3) fairness; and (4) enforcement. The Commission recognizes that some of its recommendations will require additional research, including study of how Title IX relates to other debates in postsecondary education over accountability, cost, governance, and quality. It is clear that Title IX enforcement requires reform in order to make the law more clear, fair, and enforceable, and truly open to all. Seven appendixes contain a glossary, references, and other supplemental information, including a list of Commission members. (Contains 1 table, 1 figure, and 22 references.) (SLD)

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"OPEN TO ALL"
TITLE IX AT THIRTY

The Secretary of Education's Commission on Opportunity in Athletics

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TITLE IX AT THIRTY

February 28, 2003

The Secretary of Education's Commission on Opportunity in Athletics

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U.S. Department of Education
Rod Paige
Secretary

Secretary of Education's Commission on Opportunity in Athletics
Deborah A. Price
Executive Director

February 2003

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LETTER OF TRANSMITTAL

Feb. 26, 2003

The Honorable Rod Paige
U.S. Secretary of Education
400 Maryland Ave., S.W.
Washington, DC 20202

Dear Mr. Secretary:

On June 27, 2002, you created the Secretary's Commission on Opportunities in Athletics. Today, the 15 members of the Commission are pleased to present to you our final report, "Open to All: Title IX at Thirty."

"Open to All" represents a strong consensus of the Commission. Included in our report are findings and recommendations for improving the enforcement of Title IX. Our work is a result of over eight months of spirited debate and an extensive fact-finding process that was open, fair and inclusive. We sought and received a wide range of views from experts and advocates, women and men, and girls and boys who compete on our nation's playing fields each day. These citizens told us of their experiences. Many related how Title IX has opened new vistas for them. Others described setbacks and disappointments because of the interpretation of the law. Along the way, however, we found unanimous support throughout the country for the spirit of Title IX.

We hope that "Open to All" will provide you with ample and valuable information. As you have stated about the Commission, *we just want to make a good thing better.* Toward that end, the Commission developed 23 key recommendations, 15 of which were approved unanimously by the Commission. Our recommendations should provide you with fresh ideas on how the Department and its Office for Civil Rights may improve Title IX enforcement. Our recommendations not only speak to compliance, they also speak to the need for greater clarity and education from the Office for Civil Rights to the nation's sports administrators, educators, coaches, athletes, and parents, and the need to ensure continued progress in eliminating discrimination against women.

The members of the Commission share your support for Title IX, and it is our fervent hope that the law will lead to opportunities that are open to all. Each Commission member thanks you for the opportunity to serve on the panel and to engage in this vitally important work.

Sincerely,

Ted Leland
Co-Chair

Cynthia Cooper-Dyke
Co-Chair

EXECUTIVE SUMMARY

"Without a doubt, Title IX has opened the doors of opportunity for generations of women and girls to compete, to achieve, and to pursue their American Dreams. This Administration is committed to building on those successes." – U.S. Secretary of Education Rod Paige, June 2002

On June 27, 2002, U.S. Secretary of Education Rod Paige established the Secretary's Commission on Opportunities in Athletics—the first federal advisory panel created to study Title IX. The purpose of the 15-member Commission was to collect information, analyze issues, and obtain broad public input directed at improving the application of current federal standards for measuring equal opportunity for men and women and boys and girls to participate in athletics under Title IX.

Passed by Congress as part of the Education Amendments of 1972, Title IX provides that "*[N]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.*"

The Commission reached consensus on many issues. In fact, of the 23 recommendations passed by the Commission, 15 were approved by unanimous consent.

As noted in the Commission's charter (see Appendix 3), prior to the enactment of Title IX many schools and postsecondary institutions were free to discriminate against women and girls. However, over the past three decades many new doors of opportunity have been opened for women and girls. In 1972, when Title IX was enacted, 44 percent of all bachelor's degrees were earned by women, as compared to 57 percent in 2000.[1] During the same period, the percentage of women earning medical degrees increased from 9 to 43 percent. Title IX (along with changes in the view of what roles girls and women should play in society) has also had a marked impact on the athletics programs offered by educational institutions across the country. The number of women's and girls' athletic teams at both the high school and college levels has dramatically increased. From 1981 to 1999, the total number of college women's teams increased by 66 percent.[2] The growth of certain women's sports has been explosive during this period. According to the General Accounting Office, for example, colleges created over 846 new women's soccer teams. In 1971, 294,015 girls participated in high school athletics. Today, over 2.7 million girls participate in high school athletics. This represents an 847 percent increase.[3] It is clear, though, that more still needs to be done to ensure that girls and women are not discriminated against and that we continue to expand the array of athletic opportunities available to men, women,

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[1] National Coalition for Women and Girls in Education. 2002. *Title IX at Thirty: Report Card on Gender Equity.*

[2] Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Teams, GAO-01-297, March 2001, p. 11.

[3] National Federation of State High School Associations. 2000. *NFHS Participation Survey (NFHS), 1999-2000.*

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boys and girls. As further noted in the Commission's charter, despite the gains in athletic programs for women and girls, issues have been raised about the effectiveness of the federal government's Title IX enforcement. The questions generally fall in two areas:

- Guidance: Many college administrators claim that the U.S. Department of Education has failed to provide clear guidance on how postsecondary institutions can comply with Title IX standards and policy interpretations.
- Enforcement Activities: While many claim that the Department's Office for Civil Rights has not effectively enforced Title IX, others argue that the manner in which the Department enforces the law needlessly results in the elimination of some men's teams.

An Open & Fair Process

The Secretary charged the Commission with addressing seven key questions:

- Are Title IX standards for assessing equal opportunity in athletics working to promote opportunities for male and female athletes?

- Is there adequate Title IX guidance that enables colleges and school districts to know what is expected of them and to plan for an athletic program that effectively meets the needs and interests of their students?

- Is further guidance or other steps needed at the junior and senior high school levels, where the availability or absence of opportunities will critically affect the prospective interests and abilities of student athletes when they reach college age?

- How should activities such as cheerleading or bowling factor into the analysis of equitable opportunities?

- How do revenue producing and large-roster teams affect the provision of equal athletic opportunities? The Department has heard from some parties that whereas some men athletes will "walk on" to intercollegiate teams—without athletic financial aid and without having been recruited—women rarely do this. Is this accurate and, if so, what are its implications for Title IX analysis?

- In what ways do opportunities in other sports venues, such as the Olympics, professional leagues, and community recreation programs, interact with the obligations of colleges and school districts to provide equal athletic opportunity? What are the implications for Title IX?

- Apart from Title IX enforcement, are there other efforts to promote athletic opportunities for male and female students that the Department might support, such as public-private partnerships to support the efforts of schools and colleges in this area?

The Commission addressed these seven questions in six public meetings. Beginning in July of 2002 and continuing through its last meeting in January 2003, the Commission gathered information and data representing a variety of viewpoints on Title IX and the Department of Education's enforcement standards. At four town hall meetings held in Atlanta, Chicago, Colorado Springs, and San Diego, the Commission heard from more than 50 expert witnesses representing Title IX advocacy groups, post-secondary institutions, sports governing bodies, high school and college sports associations, think tanks, and many other organizations. Each town hall meeting also offered extensive opportunities for public comment. As a result, the Commission heard directly from hundreds of parents, athletes, and administrators of elementary and secondary schools, colleges and universities. Finally, the Commission reviewed thousands of documents, reports, letters, and e-mails submitted by experts and citizens nationwide.

Recommendations

Throughout its fact-findings process, the Commission found strong and broad support for the original intent of Title IX, coupled with a great deal of debate over how the law should be enforced. The Commission also found a great deal of confusion about Title IX and a lack of clarity in guidance from the Office for Civil Rights pertaining to enforcement. (See "Commission Findings" on page 21 for a full list and description of the findings.)

Four themes – commitment, clarity, fairness, and enforcement – frame the Commission's recommendations.

In response, the Commission adopted 23 key recommendations. Overall, the Commission found consensus on most issues. In fact, of the 23 recommendations adopted by the Commission, 15 were approved by unanimous consent. (See page 33, for a full description of the recommendations.) **The Commission wishes to draw attention to the following recommendations and the four themes that emerged with them:**

Commitment

- *The Department of Education should reaffirm its strong commitment to equal opportunity and the elimination of discrimination for girls and boys, women and men.* (Recommendation 1)

Clarity

- *Any clarification or policy interpretation should consider the recommendations that are approved by this Commission, and substantive adjustments to current enforcement of Title IX should be developed through the normal federal rulemaking process.* (Recommendation 2)

- *The Department of Education's Office for Civil Rights should provide clear, consistent and understandable written guidelines for implementation of Title IX*

and make every effort to ensure that the guidelines are understood, through a national education effort. The Office for Civil Rights should ensure that enforcement of and education about Title IX is consistent across all regional offices. (Recommendation 3)

- *The Office for Civil Rights should educate educational institutions about the standards governing private funding of particular sports aimed at preventing those sports from being dropped or adding specific teams.* (Recommendation 11)

Fairness

- *The Office for Civil Rights should not, directly or indirectly, change current policies in ways that would undermine Title IX enforcement regarding nondiscriminatory treatment in participation, support services and scholarships.* (Recommendation 4)

- *The Office for Civil Rights should make clear that cutting teams in order to demonstrate compliance with Title IX is a disfavored practice.* (Recommendation 5)

- *The Department of Education should encourage the NCAA to review its scholarship and other guidelines to determine if they adequately promote or hinder athletic participation opportunities.* (Recommendation 13)

- *The Department of Education should encourage educational institutions and national athletic governance organizations to address the issue of reducing excessive expenditures in intercollegiate athletics. Possible areas to explore might include an antitrust exemption for college athletics.* (Recommendation 8)

Enforcement

- *The Office for Civil Rights should aggressively enforce Title IX standards, including implementing sanctions for institutions that do not comply. The Department of Education should also explore ways to encourage compliance with Title IX, rather than merely threatening sanctions.* (Recommendation 6)

- *The Commission made a series of recommendations on new ways in which Title IX compliance can be measured.* (Recommendations 14, 15, 17, 19, 20, 21, 23)

- *The Office for Civil Rights should allow institutions to conduct interest surveys on a regular basis as a way of (1) demonstrating compliance with the three-part test, (2) allowing schools to accurately predict and reflect men's and women's interest in athletics over time, and (3) stimulating student interest in varsity sports. The Office should specify the criteria necessary for conducting such a survey in a way that is clear and understandable.* (Recommendation 18)

Open to All: A Final Word from the Commission

The Secretary's Commission on Opportunity in Athletics is proud to offer its findings and recommendations to the Secretary. After eight months of fact-finding and deliberations, it fully understands how Title IX at thirty offers great hope to men and women athletes alike. The Commission recognizes that some of its recommendations will require additional research, including study on how Title IX relates to other important debates in postsecondary education over accountability, cost, governance, and quality. However, it is clear that Title IX enforcement requires reform in order to make the law more clear, fair, enforceable, and truly *open to all.*

THE SPECTRUM OF OPINIONS

The debate over Title IX is fundamentally a legal and national policy one. It is also an emotional debate. At times, the tenor of the debate is full of triumph and it speaks of new opportunities. But other times, the voices tell of personal loss—not gain. These same voices predict both stark and hopeful views of what could happen if Title IX or its interpretation is changed.

Throughout its work, the Commission heard the voices of hundreds of Americans. The Commission heard these voices through a process that was as open, fair, and inclusive as possible. Testimony came from more than 50 expert witnesses who traveled to meet with the Commission at its open town hall meetings in Atlanta, Chicago, Colorado Springs, and San Diego. The witnesses represented a wide variety of points of view. Hundreds of other citizens came to the meetings to provide public comment and thousands of people contacted the Commission by phone, emails or letters.

Virtually all individuals described themselves as proponents of Title IX and opponents of discrimination. However, they differed in their views of how the law should be interpreted, implemented, and enforced. Here, in their own words, are the voices of just a few of the many Americans who took the time to meet with the Commission and to provide expert testimony or public comment.

* * * *

"The word quota does not appear … What we were really looking for was equal opportunity for young women and for girls in the educational system of the United States of America. Equality of opportunity. Equality. That shouldn't really be a controversial subject in a nation that now for 200 years has prided itself in equal justice." **Birch Bayh, Former United States Senator**

"We just want to make a good thing better. We want something to help all Americans." **Rod Paige, United States Secretary of Education**

"If the decision is made to eliminate sports for gender-equity reasons, it is because institutions have chosen this path rather than pursuing other options, not because Title IX dictates such action." **Judith Sweet, vice-president for championships and senior woman administrator, National Collegiate Athletic Association**

"It is really the schools that are setting out those arbitrary limits, and what Title IX is saying in participation terms is how do we decide whether or not those schools' limits are fair and equitable?" **Marcia Greenberger, co-president, National Women's Law Center**

"The unfortunate truth is that Title IX has evolved into something never intended. The act was intended to expand opportunity. The interpretation by the Office for Civil Rights and the evolved enforcement has turned into a quota program. Title IX is a good law with bad

interpretation." **Carol Zaleski, former president and executive director, USA Swimming**

"It is good, fair legislation, and most importantly, it should be enforced. Title IX does not drop men's sports programs. Title IX is about equal opportunities." **Peggy Bradley-Doppes, athletics director, University of North Carolina-Wilmington**

"Like others before, I support Title IX as it is written. I do not, however, support some of the applications and interpretations that have evolved over the years, and I see nothing wrong with examining all aspects of Title IX in its 30th anniversary year." **Charles "Rick" Taylor, athletics director, Northwestern University**

"The three-part test (for Title IX compliance) is flexible, lawful, and reflects fundamental principles of equality." **Athena Yiamouyiannis, executive director, National Association for Girls and Women in Sports**

"I came 1,000 miles just to ask for 21st century reform to one of the most powerful pieces of legislation for women that we've seen. Let our sons play." **Beverly Brandon, parent, Fort Worth, TX**

"As it stands, the law eliminates the actual interest and ability of students as a factor in the design of varsity programs. Institutions are responsible for the raw universe of people, not the universe of students who have the varsity ability and interest, but the universe of all students, whether or not they care to be involved in varsity athletics. . . . Universities must have full discretion and responsibility to determine the breadth and scope of their athletic offerings just as they do for their academic programs." **Beverly Ledbetter, general counsel, Brown University**

"I am here to take you on a short ride in Thelma and Louise's car if you think it's fair and just to limit a girl's opportunity to play sports based on her response to an interest survey." **Geena Davis, actress and amateur archer**

"I will never complain about women getting more opportunities. I will complain about Marquette University cutting their wrestling team—that didn't cost them one penny because it was funded by outside sources—simply so it would not fall afoul of the proportionality standard, simply so they wouldn't get dragged into court and lose." **Leo Kocher, head wrestling coach, University of Chicago**

"Between 1993 and 1999 alone 53 men's golf teams, 39 men's track teams, 43 wrestling teams, and 16 baseball teams have been eliminated. The University of Miami's diving team, which has produced 15 Olympic athletes, is gone." **Christine Stolba, fellow, Independent Women's Forum**

"It is not Title IX that is the issue, it is the interpretation. The interpretation has in many ways been illogical, unfair and contrary to Congressional intent." **Grant Teaff, executive director, American Football Coaches Association**

"And I can tell you from personal experience that women who play sports in college, any sport, are significantly enhancing their chances of maximizing professional opportunities." **Val Ackerman, president, Women's National Basketball Association**

"The proportionality test purports to be a test of gender fairness, but its logic rests on one critical and dubious assumption, that males and females at every college in the nation have an equal desire to play competitive team sports." **Katherine Kersten, senior fellow, Center of the American Experiment**

"I say to the Commission that Title IX is not broken and should not be tweaked or watered down. What is broken, however, is the college football experience and the outrageous expenditures that are made in an attempt to win the 'arms race.' … The excesses in every area of the game from roster sizes to the size of coaching staff to the outlandish travel arrangements and the piano players for the recruits, could all be combined to pay for several minor sports programs." **Barbara Schroeder, director of athletics, Regis University**

"I have worked closely with the Office for Civil Rights staff on many issues and for many years. You have a dedicated and overworked group of folks there, but often I sense they are restrained in their exercise of common sense by being forced to count shower heads and to do everything on the basis of numbers, by the enforcement regulations rather than the law itself, and occasionally by someone feeling that he or she knows more about higher education administration than does the entire university hierarchy." **George Shur, general counsel, Northern Illinois University**

"I am attempting to lead that effort to bring our football program back because you cannot underestimate the importance football has on a black college campus. It enhances enrollment, alumni giving, and the marching bands." **Teresa Check, athletic director, Central State University**

"If the current trend of program elimination continues, we will suffer the consequences, as will be evidenced by the absence of American athletes on the medals' podium at future Olympic games." **Marty Mankamyer, president, United States Olympics Committee**

"Administrators are fearful that test three means that if two women—this is what you hear all the time in my world—if two women show up and want to start a team, then the interest is there and the women must be accommodated, so how do I decide whether they're really supposed to start a team or not?" **Debbie Corum, associate commissioner, Southeastern Conference**

"If I were to use the Florida Community College System as an example, the average age of students attending is 31. … I would not mean to imply that men and women at this age

do not have athletic interests, but their ability to take advantage of opportunities is definitely different." **Karen Sykes, president, National Junior College Athletic Association**

"I was here in 1972 when there was really no interest on the part of girls to participate, and the high school participation at that time was eight percent. The schools were forced to offer opportunity, and my goodness, it's now up to 42 percent." **Christine Grant, associate professor and former athletic director, University of Iowa**

"We found that 75 percent of our (school) districts were not significantly in compliance with Title IX based on questions about their written policies, their designating a Title IX coordinator, their informing students and parents about their grievance procedures and their rights." **Susan Hinrichsen, assistant executive director, Illinois High School Association**

"Our accountability is based on local control and public involvement. … As a superintendent and a principal and working with local boards, we believe we want the state and feds to stay out of our business most of the time." **Griff Powell, retired Illinois high school superintendent**

"Do you remember when 'girl sports' was an oxymoron? Do you remember when being involved in high school athletics for girls meant acting as timekeeper at the boys swimming meet? Or being a cheerleader?" **Linda Hertz, parent, Colorado Springs, CO**

"From the purely numerical standpoint, the high school is overwhelmingly where the Title IX action is. Although the collegiate level disputes have attracted more public notice, we have 20 times the number of participants in our nation's high schools." **Robert Gardner, chief operating officer, National Federation of High School Associations**

"The judicial interpretations have clearly transformed the statute from a nondiscrimination statute into an equal opportunity statute." **Col. Billy Walker, associate director of athletics and head of the Department of Physical Education, U.S. Air Force Academy**

"Only 5 percent participate in intercollegiate athletics. Ninety-five percent of the students are spectators …" **Brian Snow, general counsel, Colorado State University**

"On a per school basis the number of male athletes has decreased by 7.7 percent between 1981 and 2000. The number of female athletes has increased over that timeframe by 52.6 percent." **Corey Bray, assistant director of research, Education Services, NCAA**

"Between 1985 and 2001 male athletes have lost 57,700 athletes. … In addition, women athletes have gained a real rate of 51,967 athletes over the course of this period of time. That's a rate of gain of 2,735 women athletes per year." **Jerome Kravitz, consultant to the U.S. Department of Education and professor at Howard University**

"It's OK to have sympathy for that walk-on. It's OK to have sympathy for every male who loses his opportunity to play, but you must have unbiased sympathy. You have to feel just as sorry for every woman who didn't have the chance to play, for women who still, at the institutional level, are not getting chances to play, who are not getting benefits, and you simply can't discriminate on the basis of sex in your empathy." **Donna Lopiano, executive director, Women's Sports Foundation**

"Twenty-three years ago, seven years after the statute was passed, the policy interpretation was written by government bureaucrats with the input of some outside groups under a political deadline under a political hook." **Kimberly Schuld, former director, Play Fair**

"To us Title IX is not social activism that favors the minority. To us, it's a law designed to ensure that fully one-half of the American population gets basic rights in the classroom and on the playing field." **Rosa Perez, president, Canada College**

BACKGROUND

Recent History of Discrimination Against Girls & Women

For much of our nation's history, societal attitudes placed an artificial limit on girls and women who dared to venture beyond the roles society deemed proper. There was a time when women were denied the right to vote, practice many professions, attend elite universities, and own property if they were married. These discriminatory restrictions and burdens were not imposed upon women because they lacked the requisite capacity to engage in these activities. In large part, they were imposed because of society's limited view of the "proper" role for girls and women.

Prior to the enactment of Title IX of the Education Amendments of 1972 (Title IX), many American colleges and universities engaged in discrimination against female students. Girls and women did not have the same choices as males in many aspects of their education. They were discouraged and sometimes prevented from enrolling in higher-level course work, especially in math and science. For example, a December 2000 General Accounting Office (GAO) report notes that the percentage of women earning degrees in "predominantly male fields of study" increased significantly from the 1971-72 school year to the 1996-97 school year, and in some, women now outnumber men.

Percentages of Degrees Awarded to Women in Predominantly Male Fields of Study, School Years 1971-72 and 1996-97

	1971-72		1996-97		Women as Percentage of Total	
	Men	Women	Men	Women	1971-72	1996-97
Zoology	4,325	1,197	1,751	1,775	22	50
Business	109,688	11,578	116,512	110,096	10	49
Political Science	22,845	5,290	16,081	12,892	19	44
Law	20,266	1,498	22,548	17,531	7	44
Medicine	8,423	830	9,121	6,450	9	41
Dentistry	3,819	43	2,387	1,397	1	37
Physical Science	17,663	3,082	12,165	7,255	15	37
Computer Science	2,941	461	18,041	6,731	14	27
Engineering	50,638	526	62,510	12,491	1	17

Source: Gender Equity: Men's and Women's Participation in Higher Education, GAO-01-128, December 2000, p. 37.

Moreover, women's chances for admission to undergraduate and graduate schools typically were artificially low due to the use, in some schools, of preferences that benefited men. The discriminatory policies and practices that had the overall effect of artificially lowering the admission rate for women were not limited to the admissions process. Many women were denied opportunities to participate in intercollegiate athletics

and benefit from athletic scholarships.

Now, however, women's enrollment as college undergraduates exceeds that of men. As the GAO has noted, "[f]rom fall 1971 to fall 1997, the number of women enrolled in the nation's colleges and universities more than doubled from about 3.7 million to 8.2 million."[4] In fact, in 1997, women represented 56 percent of undergraduates, with men representing 44 percent.[5]

In 1966-67, the NCAA reported that there were approximately 152,000 male athletes participating in intercollegiate sports and recreational programs as compared to 15,000 female athletes. Between 1966-67 and 1971, before Title IX was enacted, the number of female athletes almost doubled, demonstrating a growing interest in athletics among women.

Source: NCAA Year-By-Year Sports Participation 1982-2001; Sports and Recreation Programs of Universities and Colleges 1957-82 (NCAA).

*Between 1956-57 and 1981-82, participation rates were collected in five-year intervals. The data for these years

According to the National Federation of State High School Associations, in 1971 approximately 3.7 million boys participated in high school sports as compared to 294,000 girls. In 2002, 3,960,517 boys participated but girls' participation had grown to 2,806,998.[6]

[4] Gender Equity: Men's and Women's Participation in Higher Education, GAO-01-128, December 2000, p.10.
[5] Ibid.
[6] National Federation of State High School Associations, 2002 Participation Survey.

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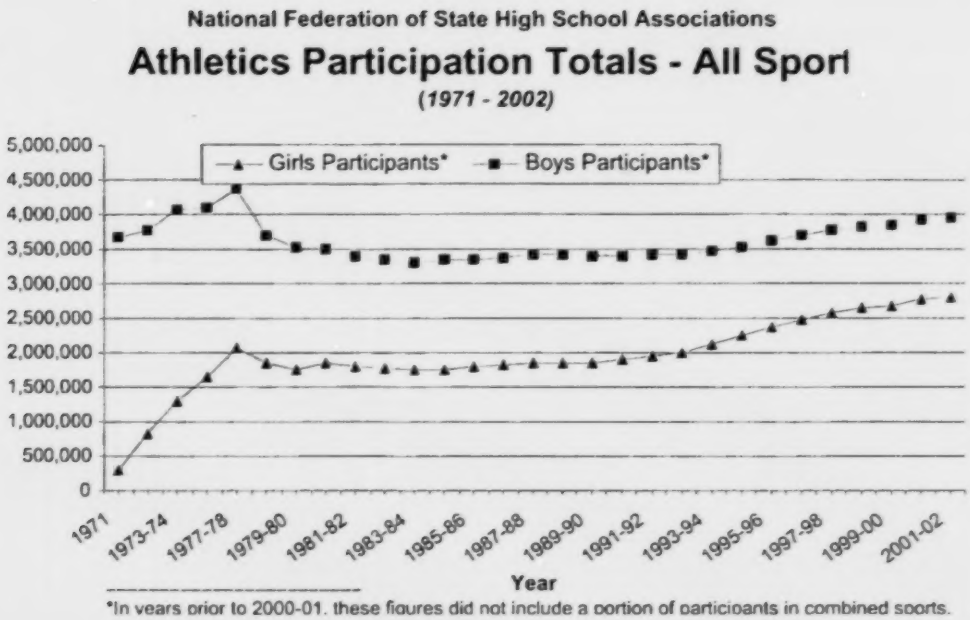

The Development of Title IX Athletics Rules

These gross statistical disparities in participation rates of women in athletics can be explained both by personal choices, and by discriminatory policies and practices. By the late 1960s, Congress began to examine the discriminatory policies and practices used by colleges and universities against women.

In 1970, U.S. Rep. Edith Green (OR) held hearings on sex-based discrimination in higher education. At one hearing, higher education administrators frankly stated that female applicants had to have higher grade point averages for admission than men. Immediately, the issue of how to end discrimination against girls and women in schools and colleges became a contentious issue. People of good will disagreed over the best way to end discrimination against women. Consequently, members of the House and Senate introduced five competing bills to end discrimination. The House-Senate Conference Committee reconciled the differences between two competing bills introduced by Senators Birch Bayh (IN) and George McGovern (SD). After approval by the House and Senate, President Richard Nixon signed the Title IX bill into law on June 23, 1972.

The basic Title IX statute provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." It further provides: "Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate

treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area."

Two years later, Congress approved the Javits amendment, which required the Department of Health, Education, and Welfare to provide regulations to implement Title IX including rules regarding intercollegiate athletics.[7] That same year, Congress rejected an amendment (the Tower amendment) to Title IX that would have exempted revenue-producing sports from the jurisdiction of Title IX.

Title IX has never been a simple law to implement. After it became law, recipients of Federal funds needed guidance on exactly what would constitute sex-based discrimination. It fell to the Department of Education's predecessor agency, the U.S. Department of Health, Education, and Welfare to write the implementing regulations for Title IX. In 1975, HEW drafted the regulations for Title IX (regulations). One section of the regulations dealt with athletics. It requires institutions to "effectively accommodate the interests and abilities of members of both sexes."[8] It also contained a requirement that athletic facilities and support services for men and women be provided on an equal basis.

In late 1978, the Department of Health, Education, and Welfare published a policy interpretation for public comment. After receiving over 700 comments and engaging in interviews and visits to gain more information, the Department finalized and adopted the interpretation one year after the initial publication in December 1979 (policy interpretation).[9] The interpretation described the responsibilities of educational institutions in three general areas: 1) financial assistance, 2) benefits and opportunities, and 3) accommodation of interests and abilities. In regards to this last responsibility, the Department provided a three-part test that educational institutions could use to demonstrate that they are accommodating the interests and abilities of their students.

The three-part test provides that an institution is in compliance with Title IX if it can demonstrate that 1) the male/female ratio of athletes at an institution is "substantially proportionate" to the male/female ratio of undergraduate enrollment, 2) it has a "history and continuing practice of program expansion" for women, or 3) it is "fully and effectively" accommodating the interests and abilities of women. This three-part test has become the focus of attention devoted to Title IX enforcement.

After the Department of Education issued the policy interpretation, a number of U.S. Supreme Court decisions shaped Title IX enforcement. In 1979, the Court ruled that Title IX implies that an individual has a right to sue if he or she is affected by a violation of Title IX.[10] This allowed educational institutions to be sued in court, rather than only

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[7] 20 U.S.C. §1681.
[8] 34 CFR § 106.41.
[9] 44 Fed. Reg. 71413 (Dec. 11, 1979).
[10] *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

being subject to an investigation by the Office for Civil Rights at HEW. In 1984, concluding a series of cases, the Court established that Title IX would only apply to the specific program at an educational institution that received federal funding.[11] Since it was rare for athletic programs to receive direct federal funding, very few athletic programs would be subject to Title IX regulation under this decision.

This situation lasted only a few years, until the U.S. Congress enacted the Civil Rights Restoration Act of 1987.[12] This law provided that all programs at educational institutions receiving federal money fall under the jurisdiction of the Office for Civil Rights. Therefore, athletic programs were again covered by Title IX regulations.

The U.S. Supreme Court further expanded the reach of Title IX enforcement in 1992 when it held that a private party could collect money damages in a Title IX lawsuit.[13] Then, in 1994, Congress enacted the Equity in Athletics Disclosure Act, which required educational institutions to disclose statistical information broken down by sex, on athletes and enrollment at universities and colleges.[14]

In recent years, eight of the thirteen federal appellate courts, following an established legal precedent of deference to reasonable regulations of administrative agencies, have sustained the legality of the three-part test.[15] The most significant of these cases was decided by the First Circuit U.S. Court of Appeals in 1996. In that case, *Cohen v. Brown University*,[16] a class of female athletes challenged a university decision to eliminate its funding of two women's teams (two men's teams were also eliminated) due to financial pressures. The case went through a long series of decisions, starting with a preliminary injunction by the U.S. District Court, which was affirmed on appeal, then a trial and decision leading to the final appeal in 1996. The Court of Appeals voted two-to-one in favor of the plaintiffs. The court held that in construing Title IX, courts are to defer to the Office for Civil Rights' policy interpretation. In 1996, the Department of Education issued a "Dear Colleague" letter that set forth the Department's policy on the three-part test. Among the many items included in this letter was a reference to the proportionality test as a "safe harbor" for compliance with Title IX.

The cancellation of men's teams has led to another set of lawsuits alleging Title IX violations in federal courts. One of the more recent decisions involved a men's wrestling team dropped by the University of North Dakota.[17] Again, the crucial issue to the appeals

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[11] *Grove City College v. Bell*, 465 U.S. 555 (1984).
[12] 20 U.S.C. §1687.
[13] *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).
[14] 20 U.S.C. §1092(g).
[15] *Roberts v. Colorado State Board of Agriculture*, 998 F.2d 824 (10th Cir. 1993); *Williams v. School District of Bethlehem*, 998 F.2d 168 (3rd Cir. 1993); *Horner v. Kentucky High School Athletic Association*, 43 F.3d 265 (6th Cir. 1994); *Kelley v. Board of Trustees*, 35 F.3d 265 (7th Cir. 1994); *Cohen v. Brown University*, 101 F.3d 155 (1st Cir. 1996); *Neal v. Board of Trustees of the California State Universities*, 198 F.3d 763 (9th Cir. 1999); *Pederson v. Louisiana State University*, 213 F.3d 858 (5th Cir. 2000); *Chalenor v. University of North Dakota*, 2002 U.S. App. LEXIS 14404 (8th Cir. 2002).
[16] 101 F.3d 155 (1st Cir. 1996).
[17] *Chalenor v. University of North Dakota*, 2002 U.S. App. LEXIS 14404 (8th Cir. 2002).

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panel was the deference owed to Office for Civil Rights' policy interpretation. The panel held that the underlying regulations are ambiguous and thus, the Office for Civil Rights' policy interpretation deserves great deference. Plaintiffs did not raise and the court did not consider the validity of the interpretation. Although the wrestlers alleged that they could get an outside donation to pay for the program, the panel held that the donation would still have been subject to Title IX.

One notable case yielded a different result from the others. In that case, a class of female students at Louisiana State University alleged that the university had failed to accommodate their athletic interests.[18] The U.S. District Court found in favor of the plaintiffs, but also suggested that reliance on the proportionality test alone would be contrary to the portion of Title IX that precludes the use of quotas. Specifically, the judge rejected the treatment of the proportionality test as a "safe harbor" for compliance with the law. On appeal, the Fifth Circuit Court of Appeals reversed the portion of the District Court opinion that held the discrimination was not intentional, but did not comment on the comments regarding proportionality.[19]

The most recent controversy involving Title IX and athletics is a lawsuit filed in the U.S. District Court for the District of Columbia January 16, 2002, *National Wrestling Coaches Association v. U.S. Department of Education*. The plaintiffs in the case are a number of organizations who are suing the U.S. Department of Education alleging that the proportionality test and enforcement of Title IX violates the statutory authority of Title IX. Specifically, the plaintiffs charge that the rules were created without following the proper procedure for rulemaking.

Although numerous plaintiffs have filed lawsuits challenging "Title IX," it is important to understand that the "law" governing compliance has four primary components: 1) the actual statute; 2) the 1975 regulations; 3) the 1979 policy interpretation; and 4) the 1996 clarification letter that sought to clarify the policy interpretation. Most, if not all, of the eight appellate challenges center on the three-part test which was created by the policy interpretation.

History of Expanding Opportunities for Female Athletes

Since athletics is only a portion of Title IX's role, and only a small percentage of students of either sex will participate in intercollegiate athletics, it is important to remember that Title IX applies to all students, not merely athletes.

Enforcement of Title IX and changing societal attitudes have resulted in tremendous gains for female athletes, though. Before Title IX went into effect, fewer than 300,000 girls throughout the United States participated in interscholastic sports.[20] By 2001, the

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[18] *Pederson v. Louisiana State University*, 912 F.Supp. 892 (D. La. 1996).
[19] *Pederson v. Louisiana State University*, 213 F.3d 858 (5th Cir. 2000).
[20] The President's Council on Physical Fitness and Sports Report, Physical Activity and Sport in the Lives of Girls: Physical and Mental Health Dimensions from an Interdisciplinary Approach (Spring 1997) at http://www.fitness.gov/girlssports.html.

number of female athletes had increased to approximately 2.8 million. The benefits that both men and women derive from participating in intercollegiate athletics are not limited to athletic skills they develop. The habits of mind and competitive drive developed by athletes remain with them when they enter the professional ranks. It is important to note that girls who play high school sports are more likely to have a higher level of confidence and improve their academic performance. They are also less likely to use drugs, become sexually active, smoke, or drop out of school.[21]

Reports from the General Accounting Office (GAO) provide a snapshot of the changes in athletic participation since Title IX was enacted:

- Young women rapidly increased their numbers in intercollegiate athletics. A GAO report from 2000 estimated that from 1972 to 1997-98, in schools belonging to the NCAA and the National Association of Intercollegiate Athletics (NAIA), women's athletic participation opportunities grew from 30,000 to 157,000.[22] A later report referencing the growth between 1981 and 1999 found that women's participation increased from 90,000 to 163,000.[23]

- For men, athletic participation fell from 248,000 to 234,000 between 1972 and 1998.[24] However, if the first decade is discounted, men's participation grew from 220,000 to 232,000 from 1981 to 1999.[25]

- A GAO report, which examined 725 NCAA member institutions that were in the same divisions in academic years 1985-86 to 1996-97, indicates that the number of women's teams increased from 5,172 to 6,048 and the number of men's teams decreased from 6,314 to 6,131.[26]

- Another GAO report looking at NCAA and NAIA member institutions, indicated that in 1998-99, there were 330 more women's teams than men's.[27]

- An independent survey indicates that at schools with an all-female student body, the 1999 percentage of the student body participating in varsity athletics ranged from 9.2 percent (Smith College) to 16.7 percent (Mt. Holyoke).[28] By comparison, among a number of coeducational liberal arts colleges, the range is

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[21] Ibid; The Women's Sports Foundation Report: Health Risks and the Teen Athlete (Dec. 2000).
[22] Gender Equity: Men's and Women's Participation in Higher Education, GAO-01-128, December 2000, p.15.
[23] Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Teams, GAO-01-297, March 2001, p. 7.
[24] Gender Equity: Men's and Women's Participation in Higher Education, GAO-01-128, December 2000, p.15.
[25] Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Teams, GAO-01-297, March 2001, p. 7.
[26] Gender Equity: Men's and Women's Participation in Higher Education, GAO-01-128, December 2000, p.15.
[27] Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Teams, GAO-01-297, March 2001, p. 11.
[28] Independent Women's Forum, Title IX Athletics, June 2000, p. 32.

between 22 percent student participation in varsity athletics with 12 percent of the female students participating (Swarthmore College), and 16 percent student participation with 6 percent of female students participating (Whittier College).

- The most recent NCAA Gender Equity Survey (2001) indicates that men's participation in varsity athletics represents 59 percent and women's 41 percent. Men receive 57 percent of athletic scholarships and women, 43 percent. Sixty-four percent of operating budgets are devoted to men's sports, with 32 percent devoted to women's.[29] It should be noted that there are nondiscriminatory reasons for some of those differences, such as differences in equipment costs between teams or varying needs for financial assistance.

A major issue that the Commission considered was the loss of athletic teams for men and women. A March 2001 GAO report indicates that among member institutions of the NCAA and NAIA, six of twenty-five women's sports experienced losses of teams between 1981-82 and 1998-99, with gymnastics losing the most teams (100).[30] For men, half (13 of 26) of men's sports experienced a net loss during this same period, with wrestling experiencing the greatest decline (171 teams).[31] Thus, from 1992-93 to 1999-2000, men's teams were discontinued twice as often as women's teams with a rate of 386 to 150.[32] Among Division I schools, 54 percent of institutions that dropped men's teams cited gender equity concerns as a "great or very great influence" in the decision.[33] Of schools that canceled women's teams, 58 percent cited lack of student interest as a great or very great influence.[34]

In summary, the statistical picture of athletic participation seems to indicate that women's participation opportunities and teams have made great progress in the past decades. At the same time, men have experienced a decrease in opportunities and teams, so that the gap between male and female athletic participation has narrowed. Specific men's sports have seen a sharp decline in institutional sponsorships.

Title IX Timeline

1972	**Title IX Enacted.** President Nixon signed Title IX into law June 23, 1972.
1974	**Javits Amendment.** This amendment called for regulations to implement Title IX.
1975	**Title IX Regulations.** Guidelines for enforcing Title IX published in the Code of Federal Regulations.

[29] NCAA Gender Equity Survey 2001.
[30] Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Teams, GAO-01-297, March 2001, p. 12.
[31] Ibid., p. 13.
[32] Ibid. p. 14.
[33] Ibid. p. 20.
[34] Ibid.

1979	**Policy Interpretation.** Interpretation of Title IX rules published in the Federal Register.
1979	***Cannon v. University of Chicago.*** Holding that Title IX creates an implied private cause of action.
1980	**Investigator's Manual**. Office for Civil Rights investigator's manual published.
1984	***Grove City College v. Bell.*** Holding that Title IX applies only to programs receiving direct federal funding.
1987	**Civil Rights Restoration Act.** Requiring all programs of an educational institution receiving federal funds to be subject to Title IX.
1990	**Investigator's Manual Revised.** Office for Civil Rights investigator's manual rewritten.
1992	***Franklin v. Gwinnett County Schools.*** Holding that monetary damages are available in Title IX lawsuits.
1994	**Equity in Athletics Disclosure Act.** Requiring colleges and universities to provide information on athletic participation according to sex.
1996	***Cohen v. Brown University.*** Establishing deference to the Office for Civil Rights' three-part test. Other federal appeals court cases are noted on page 20, note 12.
1996	**Clarification Letter.** "Dear Colleague" letter to colleges on Title IX enforcement issued by the Office for Civil Rights.
2002	***National Wrestling Coaches Association v. Department of Education.*** Lawsuit filed by national groups challenging Title IX regulations.

COMMISSION FINDINGS

Question One: Are Title IX standards for assessing equal opportunity in athletics working to promote opportunities for male and female athletes?

Finding 1:

After 30 years of Title IX, great progress has been made, but more needs to be done to create opportunities for women and girls and retain opportunities for boys and men.

Given the impassioned testimony presented to this Commission, there is universal consensus on one critical point: Every person who testified stated their full support for Title IX of the Education Amendments of 1972. It is uniformly agreed that this landmark law, enacted 30 years ago, has contributed greatly to opening doors of opportunity for women in our society. In announcing the Commission, Secretary of Education Rod Paige noted:

> "In 1972, when Title IX became law, 44 percent of all bachelor's degrees went to women—as compared to 57 percent in 2000, the most recent year data was published. Today, the majority of college students are women. And many are entering professions that once eluded them. In 1972, only 9 percent of medical degrees went to women—as compared to nearly 43 percent in 2000. In 1972, only 1 percent of dental degrees went to women—as compared to 40 percent in 2000. And in 1972, only 7 percent of law degrees went to women—as compared to nearly 46 percent in 2000. It is no longer unusual to see women in positions of power and influence—including running large companies, ruling from the bench, or advising the President of the United States. Women fill key leadership positions throughout the Administration, including at the Department of Education. Clearly, the changes brought about with the help of Title IX have greatly expanded the opportunities for girls and women to achieve their greatest potential. And, we at the Department of Education are working to build on these successes."[35]

Title IX has also significantly influenced the opportunities afforded to girls and women to participate in athletics. Deputy Secretary of Education William D. Hansen stated in his opening remarks of the Commission's first town hall meeting in Atlanta:

> "In 1971 before Title IX went into effect, more than 294,000 girls participated in high school sports. Last year that number exceeded 2.7 million, an 847 percent increase over the last 30 years. Between 1981 and 1999 the number of college women's teams rose by two-thirds. According to the General Accounting Office, our colleges created nearly 3,800 new women's sports teams, including 846 soccer teams, 516 cross country

[35] Statement of the Honorable Roderick Paige Before the Senate Committee on Health, Education, Labor and Pensions, June 27, 2002, at www.ed.gov/Speeches/06-2002/06272002.html.

teams, 432 softball teams, 350 volleyball teams, 304 indoor track teams, and 302 basketball teams."[36]

By all accounts, Title IX has been successful in promoting athletic opportunities for women. Yet, despite this progress, the Commission heard troubling testimony that some women and girls are still subject to discrimination, both in access to athletic participation opportunities and in gaining equal treatment in facilities and support services. In some cases, there are discrepancies in the share of scholarships and budgets that cause women to lag behind men in both participation and equal treatment. It should be noted, however, that not all discrepancies in areas such as funding are a result of discrimination. Some teams may be more expensive to support than others even when the two teams have exactly the same number of participants. This is also the case with some discrepancies in financial aid, which may be caused by a disproportionate need among some athletes at a particular institution to receive academic assistance and attendance at summer school.

The Commission also heard about unintended consequences of Title IX's application to intercollegiate athletics. The Commission heard a great deal of testimony about the troubling loss of athletic opportunities for male athletes at the collegiate level, particularly in Olympic sports such as track and field, gymnastics and wrestling. While everyone benefits from increased athletic participation by girls and women, no one benefits from artificial limitations on athletic opportunities for either gender. Enforcement of Title IX needs to be strengthened toward the goal of ending discrimination against girls and women in athletics, and updated so that athletic opportunities for boys and men are preserved. The Commission strongly believes that Title IX has been and needs to remain an important federal civil rights statute. This philosophy was the foundation of the Commission's work, and all of our findings and recommendations were made in an effort to identify ways to strengthen Title IX.

Finding 2:

Current Title IX policy provides for three separate ways for institutions to demonstrate that they are in compliance with Title IX's participation requirement.

The policy interpretation issued by the Office for Civil Rights in 1979 created a three-part test for an institution to demonstrate compliance with the athletic participation requirement of Title IX. The three-part test provides that an institution can demonstrate that it has adequately met the athletic interests and abilities of its students if it can show that either 1) the male/female ratio of athletes is "substantially proportionate" to the male/female ratio of student enrollment, 2) the institution has a "continuing practice of program expansion" for members of the underrepresented sex, or 3) the institution is

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[36] Opening statement to the Secretary of Education's Commission on Opportunity in Athletics, Remarks by Deputy Secretary William D. Hansen, August 27, 2002, at http://www.ed.gov/inits/commissionsboards/athletics/08272002.html.

"fully and effectively" accommodating the interests and abilities of the underrepresented sex.

If properly enforced, the three-part test can be a flexible way for schools to comply with Title IX. On numerous occasions, the Commission has heard strong support for retaining the three-part test to give schools flexibility in structuring their athletics programs while guarding against freezing discrimination into place. The three-part test in theory provides flexibility for educational institutions by providing more than one way to demonstrate compliance, while also establishing attainable goals for eliminating discrimination. The Commission has heard testimony from a number of sources that many educational institutions attempt to comply solely with the proportionality part of the test while others seek to rely on parts two or three.

As will be discussed in more detail later, though, the Commission has heard numerous complaints about the three-part test. Many have argued to the Commission that because the guidance concerning the second and third parts of the test is so ambiguous, the proportionality part is the only meaningful test. Moreover many witnesses argued that the Office for Civil Rights and private litigants have transformed *substantial* proportionality into *strict* proportionality. The Commission also concluded that the test for compliance can be revitalized if the Secretary of Education will provide new guidance, while also significantly increasing efforts to reach out with educational materials.

Finding 3:

Many practitioners feel that their institutions must meet the proportionality test to ensure a "safe harbor" and avoid expensive litigation.

Witnesses and Commissioners stated on numerous occasions that attorneys and consultants have told them that the only safe way to demonstrate compliance with Title IX's participation requirement is to show that they meet the proportionality requirement of the three-part test. This part assumes that an educational institution is not discriminating in offering participation opportunities if the male/female ratio of athletes at an institution is proportional to the male/female ratio of undergraduate enrollment at that institution. It is true that many federal courts have emphasized the proportionality requirement in Title IX litigation.[37] The facts of the *Cohen* case underscore the challenge institutions may face in meeting the evidentiary requirements of parts two and three of the three-part test, which are by their nature more subjective than part one.

The court precedent reflects the decision by the Office for Civil Rights to identify only the first part of the three-part test as a "safe harbor" for demonstrating compliance with Title IX. This means that if a school can demonstrate proportionality, there will be no further scrutiny by the Office for Civil Rights. If a school claims it is in compliance under

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[37] See *Cohen v. Brown University*, 101 F.3d 155 (1st Cir. 1996); *Horner v. Kentucky High School Athletic Association*, 43 F.3d 265 (6th Cir. 1994); *Kelley v. Board of Trustees*, 35 F.3d 265 (7th Cir. 1994); *Neal v. Board of Trustees of the California State Universities*, 198 F.3d 763 (9th Cir. 1999); *Roberts v. Colorado State Board of Agriculture*, 998 F.2d 824 (10th Cir. 1993).

one of the other tests, the Office will scrutinize that claim more carefully since compliance under either of these parts is not a safe harbor. There should be an additional effort to designate parts two and three as safe harbors along with part one. For attorneys and consultants, the easily quantifiable nature of the proportionality test, requiring as it does simple data and a clear mathematical formula, may make it more likely to be favored as a means of establishing compliance. Finally, since the first part of the test is a safe harbor, if a school were to establish compliance under one of the other prongs it might still be subjected to a subsequent complaint based on its inability to demonstrate proportionality.

Finding 4:

Although, in a strict sense, the proportionality part of the three-part test does not require opportunities for boys and men be limited, it has been a factor, along with other factors, in the decision to cut or cap teams.

The 1996 clarification letter advised educational institutions that they may "choose to eliminate or cap teams as a way of complying with part one of the three-part test." Cutting teams or limiting the available places on teams is not a requirement for complying with Title IX. However, the Commission was told that when faced with a complaint regarding its athletics programs, an institution may feel that cutting a team or capping opportunities is an easy way to gain compliance.

Testimony to the Commission established that there has been an unfortunate loss of teams, particularly in non-revenue or Olympic sports. The Commission found that it is extremely difficult to obtain a set of data that is accepted by all parties. However, all agree that there has been a troubling decrease in athletic opportunities for boys and men. At the San Diego town hall meeting of the Commission, Corey Bray, director of Research in Education Services for the NCAA, noted an increase in overall participation in athletics for men and women in NCAA championship sports. However, he also noted a decrease in the average number of men's teams (-13.7%) and male athletes (-7.7%) per institution belonging to the NCAA. He noted that this information did not take into account changes in NCAA membership over time. Jerome Kravitz, a consultant to the U.S. Department of Education and professor at Howard University, also testified at the San Diego meeting and described his findings, which control for changes in NCAA membership. He found that from 1982 to 2001, women gained 2,046 to 2,384 teams and 51,967 athletic opportunities, while men lost between 1,290 to 1,434 teams and 57,100 to 57,700 participation opportunities.

The correlation between the enforcement of Title IX and this loss of teams has also been hotly contested. Many witnesses told the Commission that they believe that teams on which they participated were cut in order to comply with Title IX. The Commission believes that it is unfair to blame the loss of teams wholly on Title IX enforcement, though. Facility limitations and budgetary concerns put heavy pressure on educational institutions to cut back their athletic programs. However, when institutions feel they must make cuts for budgetary reasons, they cannot ignore the potential effect of their decision

on Title IX compliance. For instance, a school may be concerned about litigation if it cuts a women's team without being in compliance with the proportionality test.

While an educational institution could cut a team for different reasons, a GAO report indicates that there are some predominating reasons that schools give for cutting teams. These are "gender equity considerations" and facilities/budget concerns.[38]

Finding 5:

Escalating operational costs in intercollegiate athletics threaten the effort to end discrimination in athletics and preserve athletic opportunities.

Title IX does not limit an institution's flexibility in deciding how budgets will be allocated among sports or teams. This flexibility should not be subjected to government interference, as long as those decisions are not discriminatory. There can be no question, though, that the cost of operations in intercollegiate athletics has escalated rapidly. This escalation in expenditures is often referred to as the "arms race" because as one school escalates its spending on revenue-producing sports, its competitors are required to match that move to retain competitiveness. It is clear that in some cases, this "arms race" has been the catalyst for the discontinuation of some teams.

While necessary, control of the "arms race" in athletic expenditures is well beyond the province of this Commission to control. It is also clear that many, if not most, of those involved with the leadership of intercollegiate athletics already recognize the need for national action related to the escalation. This Commission, though, would like to state its sense that all avenues must be explored in order to allow institutions to realize potentially great savings by reining in the "arms race." This savings could be the means of retaining some opportunities that might otherwise be lost.

It should be noted in this discussion that the Commission is mindful of the fact that the majority of educational institutions are Division II and III schools where the "arms race" considerations do not necessarily apply. While these institutions are faced with budgetary constraints, the issues are quite different than those that face Division I programs that are funded in part through revenue-producing sports. It should be noted that many of the athletic opportunities that have been lost have occurred at the Division II and III levels.

Question Two: Is there adequate Title IX guidance that enables colleges and school districts to know what is expected of them and to plan for an athletic program that effectively meets the needs and interests of their students?

Finding 1:

There is great confusion about Title IX requirements caused by a lack of clarity in guidance from the Office for Civil Rights.

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[38] Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Teams (GAO-01-297 March 2001).

Discussion among Commissioners and testimony offered to the Commission has indicated a widespread sense that the Office for Civil Rights has not provided enough clarity to help institutions to understand how they can establish compliance with Title IX. The confusion has involved each portion of the three-part test, but particularly the second and third parts. This confusion may result from a number of factors. Among these might be: 1) misunderstanding or ignorance about the exact nature of the requirements for Title IX compliance, 2) a lack of education by the Office for Civil Rights on the nature of the three-part test, 3) a lack of clarity in the second and third parts of the test, and 4) a need for additional technical assistance and practical examples of the ways in which institutions can comply. Some have suggested that the Equity in Athletics Disclosure Act contributes to confusion about Title IX compliance by focusing only on the relative rates of participation that would be used for the first part of the test. This might give the impression that this first part is the only effective part of the test.

With regard to the first part of the three-part test, some administrators and others felt they had received conflicting information about the nature of the "safe harbor" concept and the meaning of strict proportionality. As described above, the first part of the three-part test has been designated by the Office for Civil Rights as a "safe harbor" for demonstrating compliance with Title IX's participation requirement. Some have suggested that this gives institutions the sense that only by complying with the first part of the test can they avoid a finding of discrimination in their athletic programs. Thus, schools may feel pressure to achieve proportionality as quickly as possible regardless of how it is accomplished.

With regard to the second part of the test, there has been confusion expressed about how an institution can determine whether it is in compliance. Specifically, clarity is needed regarding the phrase "continuous expansion," and in the requirement that an educational institution must create a new women's team to comply with this test. Some have pointed to schools with an early and rapid expansion of opportunities for women but which have not made changes recently, as potentially being penalized by a requirement that teams be added continually. Similarly, some athletics directors believe their predecessors put off the appropriate expansion of opportunities for women and thus left the new director dangerously out of compliance. There has also been much testimony questioning the fairness of allowing a school to ignore the other parts of the three-part test by intermittently adding programs for women.

With regard to the third part of the test, some administrators express confusion about the possibility of using interest surveys to periodically determine levels of student interest in athletics, which then must be met with matching levels of athletic opportunity. In addition, schools expressed some concern about whether they must approve every request for recognition of a new women's team regardless of financial limitations to accommodate student interest. Thus, some witnesses have argued that if an educational institution is involved with litigation for dropping or failing to add a women's team, that fact alone would preclude a finding that they had accommodated student interest.

This wide range of confusion about the three-part test indicates a need for further information from the Office for Civil Rights about the precise meaning of these tests and the available means for complying with them. Indeed, some schools may be making decisions that may limit the athletic opportunities of their students because those schools do not understand what Title IX actually requires of them.

It is also extremely important to note that any confusion institutions feel about Title IX guidance is greatly exacerbated when schools receive contradictory guidance on compliance from different regions of the Office for Civil Rights. Because administrators may seek information on compliance from their peers in other institutions, differing standards in the regional offices of the Office for Civil Rights can have wide repercussions. Consistency across regions should be a high priority in the effort to clarify the requirements of the three-part test.

A final concern is that absent a strong, clear voice from the Office for Civil Rights about the exact nature of Title IX's requirements, an abundance of information from sources about how to comply with Title IX (such as from attorneys, private consultants, the NCAA, campus organizations and other national groups) may only add to the confusion. Administrators need to understand the legal requirements of Title IX clearly so they can evaluate advice from these other sources.

Finding 2:

The Office for Civil Rights' enforcement of Title IX can be strengthened.

Complaints to the Commission about enforcement of Title IX by the Office for Civil Rights have focused on a few areas. First, some have complained that the process of enforcement is not sufficiently transparent and that sharing of settlement letters might add transparency to the process. Second, concern has been expressed that the enforcement of Title IX is not sufficiently strong since federal funding has never been withheld from a school for failure to comply. Obviously, the hesitancy to use this penalty might be explained by the enormous effects it would have on a school's educational mission. However, some have suggested that the Office for Civil Rights may have other available sanctions short of this with which to encourage compliance.

Question Three: Is further guidance or other steps needed at the junior and senior high school levels, where the availability or absence of opportunities will critically affect the prospective interests and abilities of student athletes when they reach college age?

Finding 1:

Currently, in structuring their athletic programs, colleges are not appropriately responsive to athletic participation at the high school level.

Although there has been some discussion about issues related to Title IX compliance at the high school level, the small amount of such testimony and the expertise of the Commissioners does not allow for extensive findings on how high schools are complying with Title IX.

One important theme that has emerged has been the identification of a disconnect between high school and college athletic programs in terms of the respective opportunities they make available. While high school athletic participation for boys and girls has been steadily increasing, the nature of college athletics makes it possible for only a relatively small number of high school athletes to be able to participate in varsity sports at the college level. Thus, cuts in specific programs for men and women at the college level may severely limit the opportunities for boys and girls who participate in those sports in high school. The Commission heard testimony indicating that colleges are not always sensitive to national and regional trends in student interest at the high school level.

The Commission heard arguments that Title IX enforcement may contribute to this situation by encouraging schools to add certain teams or drop others solely to increase the relative participation percentages for students of one sex. While this may help to create the impression of opportunity, it does not necessarily best serve the interests of the high school students who will eventually be served by the college system.

In response to this disconnect, it has been suggested that if colleges are careful to factor in demonstrated athletic interest at the high school level, there may be a greater likelihood that a larger number of student athletes will be able to participate in college athletics.

Question Four: How should activities such as cheerleading or bowling factor into the analysis of equitable opportunities?

Finding 1:

The Office for Civil Rights utilizes flexible guidelines in helping schools determine whether an activity is a sport.

In response to a request from Commissioners, the Commission's staff requested information from a number of national groups and the Office for Civil Rights regarding how they define a sport. The aim of the questions was to gauge whether Title IX enforcement appropriately allows institutions to assess their compliance with the participation requirements of the Title IX regulations given emerging athletic opportunities that may not have traditionally been considered sports (so-called "emerging sports"). Commission staff sent a series of questions to six organizations: the NCAA, NAIA, NFHS, NJCAA, and the Office for Civil Rights.

The results, which were presented to all of the Commissioners, indicated that most national organizations define sports through a vote of their members. The NCAA and

NFHS have more detailed criteria for determining what is a sport. However, the NCAA definition of "emerging sports" is limited to women's athletic opportunities.

In contrast, the Office for Civil Rights does not have a definition of sports used in assessing the participation opportunities available at individual institutions. Instead, it offers technical assistance to educational institutions to help them identify whether or not activities they sponsor are athletic opportunities for purposes of Title IX compliance. This approach allows for flexibility for schools in determining which sports they will offer for their students.

The five factors identified by the Office for Civil Rights for determining whether a particular activity is a "sport" are: 1) whether the selection of teams/participants is based on factors related primarily to athletic ability, 2) whether the activity is limited to a defined season, 3) whether the teams/participants prepare for and engage in competition in the same or similar way as other teams/participants in the interscholastic or intercollegiate athletics program (e.g., with respect to coaching, recruitment, budget, try-outs and eligibility, and length and number of practice sessions and competitive opportunities), 4) whether the activity is administered by the athletic department, and 5) whether the primary purpose of the activity is athletic competition and not the support or promotion of other athletes. These criteria allow institutions wide latitude in counting participation in emerging sports as athletic opportunities for purposes of Title IX compliance.

In addition, some of the national organizations reporting to the Commission have indicated an expansion in the types of activities they recognize as sports opportunities for students. The NCAA, for instance, recognizes nine sports as emerging sports for women, including bowling and squash. Similarly, the NAIA recognizes women's wrestling as an emerging sport. The NFHS lists 13 emerging sports and state athletic associations may include even more. For instance, the Michigan High School Athletic Association recognizes competitive cheer as a sport and recently added a state championship in bowling.

Thus, emerging sports, including cheerleading and bowling as well as many others, may help schools meet their commitment to offer athletic participation opportunities to their students that meet the requirements of Title IX if they meet the guidelines of the Office for Civil Rights.

One concern expressed by some Commissioners, though, is that the Office for Civil Rights criteria are not necessarily widely disseminated to school administrators. This may prevent them from benefiting from the flexibility provided by the guidelines.

Question Five: How do revenue producing and large-roster teams affect the provision of equal athletic opportunities? The Department has heard from some parties that whereas some men athletes will "walk-on" to intercollegiate teams—without athletic financial aid and without having been recruited—women

rarely do this. Is this accurate and, if so, what are its implications for Title IX analysis?

Finding 1:

Title IX does not require mirror image men's and women's sports programs.

Current Title IX enforcement standards consider the total participation opportunities afforded each gender by an institution's athletics program, rather than the numbers or sizes of teams sponsored by the school. So, when the Office for Civil Rights examines whether an athletic program complies with Title IX's participation requirement, it does not look at the relative similarity of teams offered to either sex, but at the ways in which the school accommodates the interests and abilities of athletes. This means that Title IX does not impose a requirement that each women's team be matched by a corresponding men's team or vice versa. This appropriately allows institutions to structure their programs to reflect the relative interests on that specific campus. This allows for nondiscriminatory reasons to be factored into an institutional decision to offer opportunities that might otherwise appear inequitable (such as a team with equipment expenses or roster sizes higher than another team).

As has been noted before, Title IX does not require a school to offer any athletic opportunities if it so chooses. But when a school makes a choice to do so, it must ensure that there is no discrimination in its decision of which opportunities to make available. Outside of the requirement of nondiscrimination, the Office for Civil Rights assumes that schools will wisely tailor the programs they offer to the interests and abilities of the student body at that institution.

Finding 2:

Artificial limits on walk-on opportunities do not benefit anyone.

Although no statistical analysis of this issue has been performed, there has been much testimony about the relative rates at which men and women walk-on to teams. A walk-on athlete is one who participates in a sport without either full or partial scholarship support for their participation. A number of witnesses have told Commissioners that male athletes currently walk-on to teams at greater levels than do females. It has been alleged that this has led institutions to limit the number of men allowed to walk-on to teams, a practice known as roster management. Roster management may control the appearance of disproportional participation, but it does not create any corresponding benefit for the sex not subject to roster management.

The relative differences in rates at which men and women walk-on to teams has been explained by reference to cultural forces encouraging male sports participation, which are not matched by a corresponding set of forces for women. It has also been suggested that since women are more involved in a number of other extracurricular activities, they may be simply exercising their choices in ways different to those of men. There is wide

consensus, though, that even if the interest of men and women in taking advantage of walk-on opportunities is not the same, no one should be discouraged from walking on to teams for artificial reasons.

Artificial reasons may include: 1) cutting down on the number of opportunities available to one sex in order to ensure compliance with the proportionality part of the three-part test, and 2) avoiding the creation of new opportunities for women by limiting the number of men who can participate.

A situation where one sex loses the opportunity to walk-on to teams where no corresponding benefit to the other sex is gained is not the intent of Title IX enforcement. Limiting walk-ons for reasons other than those related to lack of institutional resources or coaching decisions has serious ramifications for students who are not allowed to participate in athletics. Schools should not impose these kinds of artificial barriers to such participation.

Finding 3:

Since Congress has previously declined to exempt revenue-producing sports from Title IX consideration, any change in that policy would have to be generated by Congressional action.

While the Commission has not heard much support for exempting revenue-generating sports from Title IX consideration, some such attempts have been made in the past. On a number of occasions, Congress considered and either rejected or failed to act on proposals to exempt football, men's basketball and other revenue-producing sports from Title IX compliance. The first was the failed Tower Amendment to the Title IX statute. The question of differential treatment for revenue-producing sports arises because some witnesses claim that schools favor revenue-producing sports to the exclusion of other sports. Others respond that the revenue generated by some teams is used to support other athletic opportunities provided by the school.

Question Six: In what ways do opportunities in other sports venues, such as the Olympics, professional leagues, and community recreation programs, interact with the obligations of colleges and school districts to provide equal athletic opportunity? What are the implications for Title IX?

Finding 1:

Opportunity at the Olympic and professional levels enhances student interest in participating in these sports in high school and collegiate programs.

In its work, the Commission has concentrated on the myriad issues surrounding Title IX enforcement. There is, however, an important role for other sports venues to play in issues related to Title IX. The Commission recognizes the great benefit athletic participation has for boys and girls. Testimony before the Commission established that

not all participation at the earliest ages takes place in a school setting. Community leagues and private sports clubs may involve many more students than elementary and secondary schools in certain sports, such as gymnastics. In addition, high profile professional and Olympic contests increase student interest in athletics. Nowhere is this more obvious than in the surge in popularity of soccer following the victory of the U.S. Women's Soccer Team in the 1996 Olympics. Although these kinds of opportunities do not change the legal requirements for compliance with Title IX, they fuel the interest that makes Title IX viable. They ought, therefore, to be encouraged.

Question Seven: Apart from Title IX enforcement, are there other efforts to promote athletic opportunities for male and female students that the Department might support, such as public-private partnerships to support the efforts of schools and colleges in this area?

Finding 1:

An increase in allowable scholarships for women's sports might help schools to come into compliance with Title IX.

The Commission heard limited discussions about the role of nonpublic entities in fostering athletic interests and opportunities. One very specific matter that received the attention of the Commission is the role of the NCAA's scholarship limits on creating opportunities in athletics. It has been suggested that increasing the allowable scholarships for some women's sports might help schools effectively attract more female athletes and thus better comply with Title IX. That might also allow schools to balance out the disparities caused when large numbers of men walk-on to teams without having scholarships. It would allow schools that have complained about not being able to fill their rosters on some women's teams to seek out women who would participate with the effective incentive of financial assistance.

COMMISSION RECOMMENDATIONS

Based on its findings, the Commission provides the following recommendations to the Secretary of Education. The Commission urges the Secretary to give these recommendations serious consideration and study. The recommendations are in italics with a brief explanatory paragraph following. Recommendations unanimously approved by the Commission are noted with an asterisk.

Recommendation 1:*

The Department of Education should reaffirm its strong commitment to equal opportunity and the elimination of discrimination for girls and boys, women and men.

A clear consensus emerged that affirmed Title IX's importance as a major federal civil rights statute that has brought about tremendous advancements in our society. The Commission heard no testimony recommending that Title IX be repealed or even revised. The Commission recognizes that while women and girls have had many new opportunities, there is much more that must be done. Title IX will continue to be a critical component of our nation's quest for fairness.

Recommendation 2:

Any clarification or policy interpretation should consider the recommendations that are approved by this Commission, and substantive adjustments to current enforcement of Title IX should be developed through the normal federal rulemaking process.

The Commission heard criticism that the current interpretation of Title IX was implemented through non-regulatory processes. The Commission strongly recommends that any new Title IX policies or procedures be subject to public notice and comment, and that the Administrative Procedures Act be strictly adhered to. When the public is given an opportunity to comment on proposed rules, the new rules can be improved by those comments. Moreover, the new rules are given legitimacy when this process is followed.

Recommendation 3:*

The Department of Education's Office for Civil Rights should provide clear, consistent and understandable written guidelines for implementation of Title IX and make every effort to ensure that the guidelines are understood, through a national education effort. The Office for Civil Rights should ensure that enforcement of and education about Title IX is consistent across all regional offices.

This recommendation addresses the widespread confusion expressed about the specific requirements of Title IX compliance and the importance of making the guidance on Title IX from the Office for Civil Rights clear, understandable, and arrived at in a transparent way. As noted in the findings, the Commission has heard complaints about inconsistency in advice on Title IX compliance across regional offices of the Office for Civil Rights.

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This recommendation aims to prevent this, and the confusion it causes, for educational institutions conscientiously trying to comply with the law.

Recommendation 4:*

The Office for Civil Rights should not, directly or indirectly, change current policies in ways that would undermine Title IX enforcement regarding nondiscriminatory treatment in participation, support services and scholarships.

Given the widespread support for and success of Title IX, the Department of Education should not change policies in a way that would threaten any progress in creating athletic opportunities for women. It should also be understood that the Commission in no way seeks to lessen the importance of institutional requirements related to nondiscrimination in facilities and support services although these are not discussed at length in this report.

Recommendation 5:*

The Office for Civil Rights should make clear that cutting teams in order to demonstrate compliance with Title IX is a disfavored practice.

The loss of teams described in the Commission's findings, and eloquently described by many of the people affected, have caused the Commission great concern. Although the Commission recognizes that that the decision to drop a team is affected by many factors, it should be made clear to schools that it is not a favored way of complying with Title IX. The fundamental premise of Title IX is that decisions to limit opportunities should not be made on the basis of gender. Therefore, educational institutions should pursue all other alternatives before cutting or capping any team when Title IX compliance is a factor in that decision. If indeed teams have to be cut, student athletes should be given justification and adequate notice.

Recommendation 6:*

The Office for Civil Rights should aggressively enforce Title IX standards, including implementing sanctions for institutions that do not comply. The Department of Education should also explore ways to encourage compliance with Title IX, rather than merely threatening sanctions.

Testimony before the Commission has noted that no school has been denied federal funding for failure to comply with Title IX. Although this is a dramatic enforcement mechanism, it is still available when there is no compliance. Other mechanisms should be pursued with educational institutions that encourage compliance and are not necessarily punitive.

Recommendation 7:*

The Department of Education should encourage educational and sports leaders to promote male and female student interest in athletics at the elementary and secondary levels to encourage participation in physical education and explore ways of encouraging women to walk on to teams.

In addition to enforcement of Title IX, much should be done to encourage interest in athletics. The Commission recommends that the Department of Education explore innovative programs to support and nurture a strong interest in athletics and physical fitness. The Commission recommends that the Department explore this issue closely with the President's Council on Physical Fitness. The Department should also consult with national sports organizations, foundations, and professional sports leagues about increasing their commitment to developing youth sports programs. The Commission believes that if young girls and boys are participating in large numbers in youth sports programs, our culture will continue to change so that athletic opportunities at the intercollegiate level will come to include equal opportunities for women.

Recommendation 8:

The Department of Education should encourage educational institutions and national athletic governance organizations to address the issue of reducing excessive expenditures in intercollegiate athletics. Possible areas to explore might include an antitrust exemption for college athletics.

One of the major factors identified by the Commission in the decision to cut teams is the lack of resources at some schools. The Commission has also heard much testimony about ever-mounting expenditures on college athletics that may exacerbate the problem. Sound use of financial resources will contribute to the continuation of broad sports programs that include Olympic sports, the Commission believes that the Department of Education could make helpful suggestions related to this matter. One Commissioner expressed opposition to an antitrust exemption for college athletics.

Recommendation 9:*

The Department of Education should encourage the redesign of the Equity in Athletics Disclosure Act so that it provides the public with a relevant and simplified tool to evaluate the status of Title IX compliance in the nation's post-secondary institutions.

The Commission has heard that the current form for Equity in Athletics Disclosure Act reporting may contribute to the sense that schools need to comply solely with the first part of the three-part test. The Commission also felt that the form should be significantly simplified. Since this form was created legislatively, any change would come about through Congress, so this recommendation is framed as a suggestion of encouragement the Department of Education can give to Congress.

Recommendation 10:*

The Office for Civil Rights should disseminate information on the criteria it uses to help schools determine whether activities they offer qualify as athletic opportunities.

In its work, the Commission sensed a lack of understanding of the guidelines developed by the Office for Civil Rights to help schools determine whether activities they support are sports opportunities for purposes of Title IX compliance. This recommendation would remedy that.

Recommendation 11:

The Office for Civil Rights should educate educational institutions about the standards governing private funding of particular sports aimed at preventing those sports from being dropped or to allow specific teams to be added.

Some witnesses testified that their teams might not have been cut if their schools had been allowed to receive outside funding to support the team. This recommendation would encourage the Office for Civil Rights to disseminate information on current standards for schools considering acceptance of outside funding of sports programs.

The members of the Commission who opposed this recommendation felt that, although they did not endorse exempting private funding of specific teams, the Office for Civil Rights should be allowed to find ways in which to ensure outside funds to teams could be accepted.

Recommendation 12:

The Office for Civil Rights should reexamine its regulations regarding the standards governing private funding of particular sports aimed at preventing those sports from being dropped or to allow specific teams to be added.

This recommendation reflects the same concerns as that of the previous one. It encourages the Office for Civil Rights to review the standards by which outside individuals or groups may make contributions to sports programs at educational institutions. The Commissioners noted in regard to this recommendation that total exemption of sport-specific funding would not be appropriate under this recommendation.

In contract, some Commissioners were concerned that the current regulations are adequate and need not be revisited. They opposed this recommendation because they felt that revisiting current rules might open the door to discriminatory funding practices where teams would receive large donations that would only benefit one sex. One Commissioner felt this would be analogous to a race-specific scholarship donation.

Recommendation 13:*

The Department of Education should encourage the NCAA to review its scholarship and other guidelines to determine if they adequately promote or hinder athletic participation opportunities.

The last finding of the Commission noted that changes in scholarship limits by the NCAA might provide opportunities for schools to promote opportunities in athletics. This recommendation is aimed at the NCAA, which determines allowable scholarships.

Recommendation 14:*

If substantial proportionality is retained as a way of complying with Title IX, the Office for Civil Rights should clarify the meaning of substantial proportionality to allow for a reasonable variance in the relative ratio of athletic participation of men and women while adhering to the nondiscriminatory tenets of Title IX.

The Commission has been told that the meaning of the term "substantial proportionality" in the first part of the three-part test has been adjusted in practice to require "strict proportionality." This recommendation would clarify the meaning of "substantial proportionality."

Recommendation 15:

The Office for Civil Rights should consider a different way of measuring participation opportunities for purposes of allowing an institution to demonstrate that it has complied with the first part of the three-part test. An institution could establish that it has complied with the first part of the test by showing that the available slots for men and women as demonstrated by the predetermined number of participants for each team offered by the institution, is proportional to the male/female ratio in enrollment.

This option would allow a school to demonstrate that it has made athletic opportunities available. Even if the slots a program makes available are not filled, the school could still be in compliance with the first part of the three-part test. It would also remove artificial limitations on the walk-on athletes at an institution.

Some Commissioners who opposed this recommendation argued that since walk-on athletes receive institutional resources they should be treated the same as other athletes. In response to the concern with capping men's opportunities, they said that teams may be capped for reasons unrelated to Title IX. Finally, they stated that this recommendation did not take into consideration the possibility that female enrollment may be lower due to disparities in recruiting men and women to educational institutions.

Recommendation 16:*

In providing technical assistance, the Office for Civil Rights should advise schools, as necessary, that walk-on opportunities are not limited for schools that can demonstrate compliance with the second or third parts of the three-part test.

Since the second and third parts of the three-part test do not take into consideration the relative male/female athletic participation rates, educational institutions that want to allow large numbers of walk-on athletes should be encouraged to consider reaching compliance through parts two and three of the three-part test.

The concerns expressed by some Commissioners about the previous recommendation were also voiced in response to this one.

Recommendation 17:

For the purpose of calculating proportionality with the male/female ratio of enrollment in both scholarships and participation, these ratios will exclude walk on athletes as defined by the NCAA. Proportionality ratios will be calculated through a comparison of full or partial scholarship recipients and recruited walk-ons.

As described in the findings, the Commission feels that artificial limitations on the number of walk-ons may limit opportunities without any corresponding gain for the underrepresented sex. This recommendation aims at removing those artificial limitations.

Some commissioners expressed a concern with this recommendation because they believe that differential treatment for walk-on athletes would not be appropriate since these athletes receive resources from their institutions as do other athletes.

Recommendation 18:

The Office for Civil Rights should allow institutions to conduct continuous interest surveys on a regular basis as a way of (1) demonstrating compliance with the three-part test, (2) allowing schools to accurately predict and reflect men's and women's interest in athletics over time, and (3) stimulating student interest in varsity sports. The Office should specify the criteria necessary for conducting such a survey in a way that is clear and understandable.

Some schools have complained that they have no quantifiable way of demonstrating compliance with the third part of the three-part test. This recommendation directs the Department of Education to develop specific guidance on interest surveys and how these surveys could establish compliance with the three-part test.

Those Commissioners opposed to this recommendation believe that allowing interest surveys may prevent future progress in providing opportunities for women because offering opportunities regardless of interest may encourage participation even where none currently exists. They felt that any use of interest surveys should be limited to demonstrating compliance with the third part of the three-part test. They also faulted the recommendation for not taking into consideration the effect of historical patterns of discrimination on women's interest in athletics.

Recommendation 19:*

The Office for Civil Rights should study the possibility of allowing institutions to demonstrate that they are in compliance with the third part of the three-part test by comparing the ratio of male/female athletic participation at the institution with the demonstrated interests and abilities shown by regional, state or national youth or high school participation rates or national governing bodies, or by the interest levels indicated in surveys of prospective or enrolled students at that institution.

This recommendation provides another way for schools to quantify compliance with the three-part test.

Recommendation 20:

In demonstrating compliance with the proportionality requirement of the first part of the three-part test, the male/female ratio of athletic participation should be measured against the male/female ratio of an institution's undergraduate population minus nontraditional students.

The Commission has heard testimony indicating that nontraditional students are much less likely to participate in athletics than other students. This recommendation recognizes that phenomenon and is aimed at allowing colleges to comply with Title IX where it would be difficult to do so based on large numbers of students who, based on their circumstances, are extremely unlikely to participate in varsity sports.

The Commissioners opposing this recommendation believe that nontraditional students may be as interested in sports as any other students and should thus not be excluded from consideration in determining proportionality under the first part of the three-part test. They also argued that part three of the three-part test already allows for variances caused by nontraditional students at an educational institution.

Recommendation 21:*

The designation of one part of the three-part test as a "safe harbor" should be abandoned in favor of a way of demonstrating compliance with Title IX's participation requirement that treats each part of the test equally. In addition, the evaluation of compliance should include looking at all three parts of the test, in aggregate or in balance, as well as individually.

Many who have testified before the Commission have complained that the emphasis of the Office for Civil Rights on encouraging compliance with the first part of the three-part test by designating it as a "safe harbor" is leading institutions to limit opportunities rather than expand them. This recommendation aims to allow schools to demonstrate compliance using the other parts of the test without having to be concerned about later complaints for noncompliance with the first part.

Recommendation 22:*

The Office for Civil Rights should be urged to consider reshaping the second part of the three-part test, including by designating a point at which a school can no longer establish compliance through this part.

The Commission has heard testimony that the second part of the three-part test may no longer be necessary because schools have had since 1972 to comply with Title IX and there is no longer a need to allow them to phase-in compliance. It has also heard that the second part is so unclear as to make it almost impossible to use to demonstrate compliance with Title IX. This recommendation urges the Office for Civil Rights to examine the continued viability of the second part of the test and ways of making it more understandable.

Recommendation 23:*

Additional ways of demonstrating equity beyond the existing three-part test should be explored by the Department of Education

Over the years, changes in the demographics of athletic participation and college enrollment have made Title IX enforcement more complicated. As these kinds of changes continue, there may be further need to allow educational institutions to comply with Title IX requirements beyond those currently in place.

Recommendations Which the Commission Neither Approves nor Disapproves (Defeated by a Tie Vote):

Institutions governed by Title IX standards, as one approach to meeting the standard of proportionality, should allot 50 percent of their participation opportunities for men and 50 percent for women. A variance of 2 to 3 percent in compliance with this standard would then be allowed.

This recommendation would dramatically alter the current enforcement of Title IX in order to provide more quantifiable goals for compliance while still providing some flexibility to allow for uncontrollable changes in athletic programs such as dropouts, loss of eligibility, and walk-ons.

APPENDIX 1: SHORT GLOSSARY OF TERMS AS USED IN THIS REPORT

The Equity in Athletics Disclosure Act. This federal law requires the Secretary of Education to collect specific data on intercollegiate men's and women's athletics, including participation, staffing, revenues, and expenses. Data must be collected from higher education institutions receiving federal student financial aid. The data is provided to Congress and is made available to the public.

Letter of Clarification of 1996. The Department of Education issued this letter to U.S. colleges and universities as, "Clarification of Intercollegiate Athletics Policy Interpretation: The Three-Part Test." The letter responded to requests for specific guidance, including examples, regarding the existing standards for measuring nondiscriminatory participation opportunities. See "Three-Part Test" below.

Non-Revenue Sports. These are athletic teams that do not generate net revenue (for instance, from spectators). Given the divergence in the popularity of various sports at different campuses, the numbers and types of non-revenue sports vary by campus.

Non-Traditional Students. This phrase refers to students who are older than the traditional, full-time undergraduate college athlete, graduate and professional students, students who have children, and students who work full-time.

Office for Civil Rights (OCR). This office within the Department of Education is responsible for the enforcement of Title IX as it applies to educational institutions that are recipients of federal funds. OCR maintains 12 enforcement offices throughout the nation and a headquarters in Washington, DC.

Policy Clarification. Issued in 1979, this clarification was designed to provide guidance on the application of Title IX requirements in athletics. It sets forth three options known as the "three- part test" (see below) to determine whether an institution's intercollegiate athletic program provides non-discriminatory participation opportunities for male and female athletes.

Proportionality. This term refers to the language of the first part of the three-prong test. It states that a college may demonstrate compliance with Title IX by showing that it provides participation opportunities for male and female students in numbers that are substantially proportionate to their respective enrollment figures.

Regulation (or Rule). Under the federal Administrative Procedures Act, a regulation is an "agency statement" designed to "implement, interpret, or prescribe law or policy."

Rulemaking. This is the formal process followed by federal agencies to create, amend, or repeal regulations.

Safe-Harbor: A 1996 clarification letter from the Department of Education's Office for Civil Rights described the first portion of the three-part test for demonstrating compliance

with the regulations associated with Title IX, which is to show that the male/female ratio of undergraduate enrollment is substantially proportionate to the male/female ratio of athletic participation, as a "safe harbor" for compliance. This means that if a school is able to demonstrate substantial proportionality, the Office for Civil Rights will assume they are not involved in any illegal discrimination and ask no further questions about compliance.

Three-Part Test. the three-part test refers to a portion of the Department's policy interpretation that provides guidance on the application of the Title IX requirements to athletics. It sets forth three options to determine whether an institution's intercollegiate athletic program provides nondiscriminatory participation opportunities for male and female athletes. A school may demonstrate compliance by meeting any of the three parts.

1. Whether the institution provides opportunities for participation in intercollegiate sports for male and female students in numbers that are proportionate to their respective enrollments; or

2. Whether the institution can show a history and continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the sex that is underrepresented among intercollegiate athletes; or

3. Whether the institution can show that the present program has fully and effectively accommodated the interests and abilities of the members of the underrepresented sex.

Title IX. Passed by Congress in 1972 as part of the Education Amendments, the statute states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving federal financial assistance. Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area." Title IX applies to all aspects of education, however, the Secretary's Commission has focused solely on its role in athletics. It is the responsibility of the Department of Education and the Office for Civil Rights to assure that athletic programs are operated in a manner that is free from discrimination on the basis of sex.

Title IX Regulations. Issued in 1975, these regulations provided an unexhaustive list of factors to measure whether an institution's selection of sports effectively accommodates the interests and abilities of students of both sexes to the extent necessary to provide equal athletic opportunity.

Walk on Athletes. These athletes are usually not recruited nor have they previously received scholarships to participate in a given sport. Rather, they show up on the first day of practice hoping to gain a place on a team through a tryout.

APPENDIX 2: REFERENCES

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APPENDIX 3: COMMISSION CHARTER

The Secretary of Education's Commission on Opportunity in Athletics

AUTHORITY

The Secretary of Education's Commission on Opportunity in Athletics (Commission) is established by the Secretary of Education, and is governed by the provisions of the Federal Advisory Committee Act (FACA) (P.L. 92-463, as amended; 5 U.S.C.A. Appendix 2).

BACKGROUND

The 30th anniversary of Title IX of the Education Amendments of 1972 ("Title IX") is upon us. Title IX, signed into law by President Nixon, prohibits recipients of Federal funds from discriminating on the basis of sex. This landmark legislation and evolving societal attitudes regarding the "proper" role of women largely explain many of the opportunities that women now enjoy. Prior to the enactment of Title IX, schools and universities receiving Federal funds were free to discriminate against women (and girls), and many did. This partially explains the paucity of school and collegiate athletic teams prior to the enactment of Title IX.

Over the last 20 years, there has been a dramatic increase in the number of women's (and girls') athletic teams at both the high school and college levels. From 1981 to 1999, the total number of college women's teams increased by 66 percent. The growth of certain women's sports has been explosive during this period. According to the General Accounting Office, for example, colleges created over 846 new women's soccer teams. In 1971, 294,015 girls participated in high school athletics. Today, over 2.7 million girls participate in high school athletics. This represents an 847 percent increase.

Despite these gains, questions have been raised about the effectiveness of the Federal government's Title IX enforcement. Many college administrators claim that the Department has failed to provide clear guidance on how colleges can comply with Title IX. Several groups have alleged that the Office for Civil Rights has failed to effectively enforce Title IX. Others claim that the manner in which the Department enforces the law needlessly results in the elimination of certain men's teams. All of the advocates are passionate and determined.

PURPOSE AND FUNCTIONS

The purpose of the Commission is to collect information, analyze issues, and obtain broad public input directed at improving the application of current Federal standards for measuring equal opportunity for men and women and boys and girls to participate in athletics under Title IX.

The Commission will recommend to the Secretary, in a written report, whether those standards should be revised, and, if so, how the standards should be revised. The Commission will also recommend other steps that might be taken to improve the effectiveness of Title IX and to maintain and build upon the extraordinary progress that has resulted from its passage 30 years ago.

The Commission will collect and analyze information related to the issues described below, including information and comment from members of the public. To this end, the Commission will conduct at least three (3) townhall meetings in different parts of the country to obtain a public discussion of the issues.

STRUCTURE

The Commission will be composed of not more than 15 members appointed by the Secretary from the public and private sectors, as well as up to three (3) ex officio members from the Department of Education. The members shall include representatives of college, university, and school district officials, such as athletic directors, coaches, and other faculty, and representatives of intercollegiate and secondary school athletes; and may include researchers, state and local officials, and other persons with special expertise in intercollegiate and secondary school athletics or issues of equal educational opportunity. The membership of the Commission will be fairly balanced to reflect representation of a wide range of interests and perspectives relating to men's and women's (and boys' and girls') athletics.

The Secretary shall appoint members for the life of the Commission. Any vacancy in the Commission shall not affect its powers, but shall be filled in the same manner as the original appointment. The Secretary shall select one or more chairpersons from among the members of the Commission.

The Secretary names the Designated Federal Official (DFO) to the Commission. The Office for Civil Rights and the Deputy Secretary's Office will provide management and staff support.

MEETINGS

The Commission shall meet at the call of the DFO or the DFO's designee, who is present at all meetings. Meetings are open to the public except as may be determined otherwise by the Secretary in accordance with Section 10(d) of the FACA. Adequate public notification will be given in advance of each meeting. Meetings are conducted and records of the proceedings kept, as required by applicable laws.

A quorum of the Commission consists of eight members. A lesser number of members may hold hearings or town-hall meetings.

ESTIMATED ANNUAL COST

Members will serve without compensation. Members may each receive reimbursement for travel expenses for attending Commission meetings, including per diem in lieu of subsistence, as authorized by the Federal travel regulations. Funds will be provided by the Department of Education to administer the Commission. The estimated annual person-years of staff support are three (3) FTE. The estimated two-fiscal year cost will be approximately $700,000.

REPORT

Not later than February 28, 2003, the Commission shall submit a report to the Secretary outlining its findings and any recommendations. The Commission's report shall address:

- Are Title IX standards for assessing equal opportunity in athletics working to promote opportunities for male and female athletes?
- Is there adequate Title IX guidance that enables colleges and school districts to know what is expected of them and to plan for an athletic program that effectively meets the needs and interests of their students?
- Is further guidance or other steps needed at the junior and senior high school levels, where the availability or absence of opportunities will critically affect the prospective interests and abilities of student athletes when they reach college age?
- How should activities such as cheerleading or bowling factor into the analysis of equitable opportunities?
- How do revenue producing and large-roster teams affect the provision of equal athletic opportunities? The Department has heard from some parties that whereas some men athletes will "walk-on" to intercollegiate teams—without athletic financial aid and without having been recruited—women rarely do this. Is this accurate and, if so, what are its implications for Title IX analysis?
- In what ways do opportunities in other sports venues, such as the Olympics, professional leagues, and community recreation programs, interact with the obligations of colleges and school districts to provide equal athletic opportunity? What are the implications for Title IX?
- Apart from Title IX enforcement, are there other efforts to promote athletic opportunities for male and female students that the Department might support, such as public-private partnerships to support the efforts of schools and colleges in this area?

TERMINATION

The Commission shall terminate 30 days after submitting its report.

The Commission is hereby chartered in accordance with Section 14(b) of FACA. This charter expires two years from the date of filing or before as the Secretary determines.

APPROVED:

__July 5, 2002__
Date

__Rod Paige__
Secretary

Establishment date: __July 11, 2002__

Filing date: __July 25, 2002__

Amendment filing date: __January 7, 2003__

APPENDIX 4: COMMISSION MEETINGS

Atlanta Town Hall Meeting
August 27-28, 2002
Wyndham Atlanta Hotel
Atlanta, GA

Co-Chairs: Cynthia Cooper & Ted Leland

Presentations:

- Honorable Birch Bayh, former U.S. Senator, Indiana, 1963-1981
- Teresa Check, athletic director, Central State University
- Steve Erber, athletic director, Muhlenberg College
- Ron Galimore, National Governing Board, Gymnastics, United States Olympic Committee
- Christine Grant, associate professor and former athletic director, University of Iowa
- Marcia Greenberger, co-president, National Women's Law Center
- Bob Groseth, head coach, men's and women swimming, Northwestern University
- William Hansen, deputy secretary, U.S. Department of Education
- Leo Kocher, head wrestling coach, University of Chicago
- Crista Leahy, clerk for Judge Easterbrook, Seventh Circuit Court of Appeals
- Beverly Ledbetter, general counsel, Brown University
- Ron Mirikitani, professor, physical education, St. Louis Community College
- Gary Phillips, assistant executive director, Georgia High School Association
- Christine Stolba, fellow, Independent Women's Forum
- Judith Sweet, vice-president for championships and senior woman administrator, National Collegiate Athletic Association
- Grant Teaff, executive director, American Football Coaches Association

Chicago Town Hall Meeting
September 17-18, 2002
The Drake Hotel
Chicago, IL

Co-Chairs: Cynthia Cooper & Ted Leland

Presentations:

- Washington Bush, director of athletics, Conant High School
- Ron Case, director of athletics, Gloucester County College
- Robert Gardner, chief operating officer, National Federation of High School Associations
- Sue Hinrichsen, assistant executive director, Illinois High School Association

BEST COPY AVAILABLE

- Katherine Kersten, senior fellow, Center of the American Experiment
- Kevin McCarthy, director of athletics, State University of New York, Cobleskill
- Kathleen McGee, director of athletics and head girl's basketball coach, Powers Catholic High School
- Griff Powell, retired high school superintendent
- Karen L. Sykes, president, National Junior College Athletic Association
- Wayne Watson, chancellor, City Colleges of Chicago
- Kathleen Welch, dean of students and director of athletics, Kennedy-King College
- Athena Yiamouyiannis, executive director, National Association for Girls and Women in Sports
- Deborah Dahlen Zelechowski, senior vice president of institutional advancement, Robert Morris College

Colorado Springs Town Hall Meeting
October 22-23, 2002
The Cheyenne Mountain Resort
Colorado Springs, CO

Co-Chairs: Cynthia Cooper & Ted Leland

Presentations:

- Gary Abbott, director of special projects, National Governing Board of USA Wrestling
- Bob Chichester, athletic director, California State University-Irvine
- Bob Colarossi, president, USA Gymnastics
- Peggy Bradley-Doppes, athletics director, University of North Carolina-Wilmington
- Rondo Felberg, former athletics director, Brigham Young University
- Marty Mankmayer, president, U.S. Olympics Committee
- Josephine Potuto, professor of law, University of Nebraska
- George Shur, general counsel, Northern Illinois University
- Brian Snow, general counsel, Colorado State University
- Charles "Rick" Taylor, athletics director, Northwestern University
- Col. Billy Walker, associate director of athletics and head of the Department of Physical Education, U.S. Air Force Academy
- Carol Zaleski, former president and executive director, USA Swimming

San Diego Town Hall Meeting
November 20-21, 2002
Wyndham San Diego at Emerald Park
San Diego, CA

Co-Chairs: Cynthia Cooper & Ted Leland

Presentations:

- Val Ackerman, president, Women's National Basketball Association
- Rick Bay, executive director of intercollegiate athletics, San Diego State University
- Sam Bell, president, College Track Coaches Association
- Carey Bray, assistant director of research, Education Services, NCAA
- Debbie Corum, associate commissioner, Southeastern Conference
- Jerome Kravitz, consultant to the U.S. Department of Education and professor at Howard University
- Donna Lopiano, executive director, Women's Sports Foundation
- Chuck Neinas, president, Neinas Sports Services
- Rosa Perez, president, Canada College
- Kimberly Schuld, former director, Play Fair
- Jon Vegosen, representative, U.S. Tennis Association
- John Welty, president, California State University-Fresno
- Andrew Zimbalist, professor, Department of Economics, Smith College

Philadelphia Commission Meeting
December 3-4, 2002
Philadelphia Marriott
Philadelphia, PA

Co-Chairs: Cynthia Cooper & Ted Leland

Washington, D.C. Commission Meeting
January 29-30, 2003
Hilton Washington and Towers Hotel
Washington, DC

Co-Chairs: Cynthia Cooper & Ted Leland

APPENDIX 5: COMMISSIONERS AND STAFF

Commissioners

Cynthia Cooper-Dyke, Co-Chair

Cynthia Cooper is the chief executive officer of the sports marketing company ProHaven, Inc. Cooper served as head coach to the Women's National Basketball Association's Phoenix Mercury for one and a half seasons and, as a player, led the Houston Comets to four-straight WNBA championships. She is the WNBA's all-time leading scorer. Cooper was a member of the 1992 bronze-medal-winning U.S. Olympic Women's Basketball Team and the 1988 gold-medal-winning Olympic team.

Ted Leland, Co-Chair

Ted Leland is the director of athletics at Stanford University. In 2000-2001, he was named the National Association of Collegiate Directors of Athletics/Street & Smith's Sports-Business Journal Division I Athletic Director of the Year. Leland has guided Stanford to eight consecutive Sears Directors' Cup Championships. He served on the NCAA's Management Council for eight years, including two years as its chairman.

Percy Bates

Percy Bates is a professor in the School of Education at the University of Michigan and director of programs for Educational Opportunities, a cooperative agreement between the University of Michigan and the U.S. Department of Education. Bates has served as the university's faculty representative to the Big Ten Conference and the NCAA for the past 12 years. In 2002, he chaired the NCAA's Division 1 Management Council. Bates was the chairman of the Higher Education Commission of the National Alliance of Black School Educators. He also served as deputy assistant secretary for special education at the U.S. Department of Education.

Bob Bowlsby

Bob Bowlsby is the director of athletics at the University of Iowa. He was recently named National Athletic Director of the Year by Street & Smith's Sports Business Journal and Regional Athletic Director of the year by the National Association of Athletics Directors. Bowlsby has served as chair of the Big Ten Championships and Awards Committee Council, and chair of the NCAA Management Council during its first two years. Bowlsby has also served as director of men's athletics and the assistant athletic director for facilities at the University of Northern Iowa.

Eugene B. DeFilippo Jr.

Eugene (Gene) B. DeFilippo Jr., is the director of athletics at Boston College. Previously, he served as director of athletics at Villanova University where he was named to the NCAA Division I Management Council. DeFilippo was both assistant and associate athletics director for external affairs at the University of Kentucky, director of athletics at the University of South Carolina at Spartanburg, and director of administrative services at Vanderbilt University. He has been a member of the NCAA Special Committee on Marketing, Promotions and Licensing, and the executive board of the Philadelphia Sports Congress.

Donna de Varona

Donna de Varona was an original member and the first president of the Women's Sports Foundation. A two-time Olympian and a double gold medallist in the 1964 Tokyo Olympics, de Varona broke 18 world best and world record times during a swimming career that earned her recognition by The Associated Press and United Press International as the most outstanding female athlete of 1964. An Emmy-winning broadcaster, de Varona has covered 12 Olympic Games for network and cable television. She served four terms on the President's Council on Physical Fitness as well as two other Presidential commissions. Awards for leadership include the Teddy award given by the NCAA, the Olympic Order for outstanding contributions to international sport and the USOC Olympia award for work on behalf of America's Olympians. A gradate of UCLA, Ms. de Varona has four honorary doctorates. A proud parent of two teenagers she writes and broadcasts radio commentaries for sporting news radio and is a special contributor to ABC Sports.

Julie Foudy

Julie Foudy is the president of the Women's Sports Foundation and captain of the U.S. Women's National Soccer Team. Foudy captained the U.S. National Women's Soccer Team that won a silver medal at the 2000 Olympic Games and the championship team of the 1999 Federation International de Football Association (FIFA) Women's World Cup. A 16-year veteran of the U.S. women's soccer team, Foudy won a gold medal at the 1996 Olympic Games and 1998 Goodwill Games. She also was a member of the 1991 U.S. National Team that captured the first ever FIFA Women's World Cup in China. She received a bronze medal with the U.S. team at the 1995 FIFA Women's World Cup. In 1997, Foudy became the first woman and first American to receive the FIFA Fair Play Award for her work against child labor. She graduated from Stanford University in 1993 with a Bachelor's degree in Science.

Thomas B. Griffith

Thomas B. Griffith is general counsel and assistant to the president at Brigham

Young University. Previously, he was a partner in the Washington, D.C., law firm of Wiley, Rein and Fielding. From 1995 to 1999, Griffith served as Senate Legal Counsel of the United States, the chief legal officer of the United States Senate.

Cary Groth

Cary Groth is the director of the 17-sport athletics program at Northern Illinois University. With her appointment in 1994, she became only the third woman athletic director among the then 107 major-college institutions with Division I-A football programs. In 1998, Street & Smith's Sport Business Journal chose Groth as among the Super 50: Women Sports Executives. Groth has been selected for two terms on Illinois' Special Commission on the Status of Women and has served as president of the National Association of Collegiate Women Athletic Administrators (NACWAA).

Lisa Graham Keegan

Lisa Graham Keegan is the chief executive officer of the Education Leaders Council. Prior to holding this position, she was Arizona's superintendent of public instruction. Keegan is known for her focus on educational improvement and reform, including efforts for student centered funding, charter schools, expanded school choice, and marketplace incentives. She also served in Arizona's House of Representatives, where she chaired the Education Committee. In March of 1999, Keegan was presented with the Milton and Rose D. Friedman Foundation Award for Leadership in Educational Choice. In May of 1999, the Republican Women Leaders Forum honored her as Educator of the Year.

Muffet McGraw

Muffet McGraw is head coach of the University of Notre Dame women's basketball team. She has guided Notre Dame to 13 20-win seasons, nine NCAA Tournament bids, four NCAA Sweet Sixteen appearances, two Final Four berths, and the 2001 NCAA National Championship. McGraw has been named coach of the year by four different conferences: Big East, Midwestern Collegiate, North Star and East Coast). In addition, she was the consensus National Coach of the Year in 2001 after piloting Notre Dame to its first national title.

Rita J. Simon

Rita J. Simon is founder and president of the Women's Freedom Network. Since 1988, she has been a University Professor in the School of Public Affairs and the Washington College of Law at American University. Simon served as dean of the School of Justice at American University from 1983 to 1988. She has authored over 200 articles, over 29 books and monographs, and has edited 17 books on topics ranging from women's issues, immigration, criminology, and transracial adoption. Most recently, she edited "Neither Victim Nor Enemy: Women's

Freedom Network Looks At Gender In America," a collection of papers by leading writers and feminist writers on the status of gender relations in the United States. She is currently editor of Gender Issues.

Mike Slive

Mike Slive is the commissioner of the Southeastern Conference and was the first commissioner of Conference USA. Slive has an extensive administrative and legal background in intercollegiate athletics. He served as the assistant commissioner in the Pacific 10 Conference and the Director of Athletics at Cornell University. He was the chair of the first NCAA Infractions Appeals Committee as well as the National Letter of Intent Appeals Committee and the NCAA Football USA Board of Directors, and president of the Association of Collegiate Commissioners. Slive also serves on the NCAA Management Council.

Graham Spanier

Graham Spanier is the president of Pennsylvania State University. Spanier's prior positions include chancellor of the University of Nebraska-Lincoln, provost and vice president for academic affairs at Oregon State University, and vice provost for undergraduate studies at the State University of New York at Stony Brook. A distinguished researcher and scholar, Spanier has published more than 100 scholarly papers and 10 books. He is a family sociologist, demographer, and marriage and family therapist. A national leader in higher education, Spanier is chair of the board of directors of the National Association of State Universities and Land-Grant Colleges. He also served as chair of the NCAA Division I Board of Directors and chaired the Kellogg Commission on the Future of State and Land-Grant Universities.

Deborah Yow

Deborah Yow is the director of athletics at the University of Maryland. She served as president of the National Association of Collegiate Directors of Athletics in 2000-01. With graduation rates consistently high and many or her women's teams nationally ranked and regularly appearing in post seasonal play each year, Sports Illustrated for Women ranked Maryland athletics as one of the Top 10 programs in the nation for female athletics—while the overall Terrapin athletic program is ranked in the Top 20 nationally in 2002 among all NCAA Division I programs for overall quality. Dr. Yow also earned the Carl Maddox Award as the outstanding athletic director nationally, presented by the United States Sports Academy. She was recently selected for induction into the State of Maryland Women's Hall of Fame and oversees a $43 million annual budget and 200 employees. Yow is a former collegiate basketball coach at the University of Kentucky and the University of Florida.

Ex Officio Members

Brian W. Jones

Brian W. Jones is the U.S. Department of Education's general counsel. Previously, Jones was an attorney in private practice with the San Francisco law firm of Curiale Dellaverson Hirschfeld Kelly & Kraemer, LLP. Before returning to private practice in 1999, Jones served as deputy legal affairs secretary to California Governor Pete Wilson and as counsel to the United States Senate Judiciary Committee in Washington, D.C, Jones also served as president of the Center for New Black Leadership, Washington, DC.

Gerald A. Reynolds

Gerald (Jerry) A. Reynolds is the U.S. Department of Education's assistant secretary of education for civil rights. Prior to his appointment, Reynolds served as senior regulatory counsel for Kansas City Power & Light Company, a Missouri-based energy company. Reynolds has served as president of the Center for New Black Leadership and as a legal analyst for the Center for Equal Opportunity. He also practiced law with Schatz & Schatz, Ribicoff & Kotkin, a Connecticut law firm.

Sally L. Stroup

Sally L. Stroup is the U.S. Department of Education's assistant secretary for postsecondary education. Before joining the Department, Stroup served as the director of industry and government affairs for the Apollo Group Inc./University of Phoenix. From 1993 to 2001, she was a professional staff member for the U.S. House of Representatives Committee on Education and the Workforce. From 1981 to 1993, Stroup was with the Pennsylvania Higher Education Assistance Agency. First serving as a staff attorney, Stroup rose to senior staff attorney and then to senior vice president of legal services and chief counsel.

Staff

Deborah A. Price, Executive Director

Deborah Price came to the Department of Education in June 2002, from the United States Senate. There she was a policy adviser in the Office of the Senate's Assistant Majority Leader, Don Nickles. In that capacity, Price advised the Republican leadership on a range of domestic policy issues, including education, and assisted Senator Nickles in his duties as Republican Whip, monitoring issues and procedural developments on the Senate floor. A veteran of 16 years on Capitol Hill, Price has worked as an aide providing guidance on various policy issues to the Senate Republican leadership since 1991. A University of Missouri graduate, Price also has done graduate work at Fuller Theological Seminary in California.

Matthew Becker, Deputy Director

Matt Becker has served with the Bush administration in both the Department of Labor and the Department of Education in their offices of Intergovernmental Affairs. He is a 1995 graduate of Michigan State University's James Madison College.

William Duncan, Counsel

Prior to joining the Commission staff, Bill Duncan worked as a research fellow based at the Columbus School of Law, The Catholic University of America. He graduated from the J. Reuben Clark Law School, Brigham Young University in 1998.

Marissa Ann Munoz, Special Assistant

Prior to joining the Commission staff, Marissa Muñoz was the confidential assistant to the President's Commission on Excellence in Special Education. She has worked in the Office of Presidential Personnel at the White House.

Virginia A. DeMint, Special Assistant

Prior to joining the Commission staff, Ginger DeMint was a part of Secretary Paige's speechwriting team. Before coming to the Department of Education, Ginger worked as a member of the Republican National Committee's research department.

Sally W. Richards, Adviser

In addition to being a member of the Commission staff, Sally Richards is a competitive female athlete in a variety of sports including alpine ski racing and marathon running. She is a former member of the U.S. Track and Field Team, and she holds a number of U.S. and World Master's records. In March 2000 she was inducted into the Colorado Sportswomen Hall of Fame. She is a graduate of the University of Colorado and the University of Grenoble, France.

Cheryl Moss, Administrative Assistant

Prior to joining the Commission staff, Cheryl Moss is a graduate from Brigham Young University where she graduated with a major in English in 2000.

Consultant

Jay A. Diskey, Diskey & Associates, Washington, DC

APPENDIX 6: RECOMMENDATION VOTE COUNT

Recommendation 1: Consensus

Recommendation 2: 12-1

Recommendation 3: Consensus

Recommendation 4: Consensus

Recommendation 5: Consensus

Recommendation 6: Consensus

Recommendation 7: Consensus

Recommendation 8: 12-1

Recommendation 9: Consensus

Recommendation 10: Consensus

Recommendation 11: 10-3

Recommendation 12: 10-3

Recommendation 13: Consensus

Recommendation 14: Consensus

Recommendation 15: 10-3

Recommendation 16: Consensus

Recommendation 17: 8-5

Recommendation 18: 8-5

Recommendation 19: Consensus

Recommendation 20: 9-4

Recommendation 21: Consensus

Recommendation 22: Consensus

Recommendation 23: Consensus

Additional Recommendation (Forwarded Without Approval): 7-7

APPENDIX 7: RECORD OF VOTES, WASHINGTON, D.C. MEETING

Vote 1 Consensus

Item: Accepting Procedures of Meeting

Those favoring believed the procedure would fairly represent dissenting views on Commission recommendations by noting them in the text of the recommendation's description.

Vote 2 8-6

Item: Inclusion of information on participation in athletics at all female schools.

Those favoring believed the information was relevant and helpful as long as it was related to a valid comparison group.

Those opposing believed the information was irrelevant since these schools are exempt from Title IX.

Vote 3 6-6-1

Item: Reconsideration of previous vote.

Those favoring believed the information at issue is irrelevant.

Those opposing believed the information could be accurate as long as the participation noted involved varsity sports.

Vote 4 4-9

Item: Consideration of adding language to question one, finding one.

Those favoring believed more information on current statistics was needed in this section.

Those opposed believed that current information was adequate.

Vote 5 3-9

Item: Reconsideration of question one, finding 5.

Those favoring believed draft language on Division II and III schools should be removed.

Those opposing believed the information was appropriate.

Vote 6 9-3

Item: Keeping question five, finding two in document.

Those favoring believed that the limitation of walk-on opportunities which does not bring a corresponding benefit to other female athletes is not a valuable practice.

Those opposing questioned the relevance of this information.

Vote 7 Consensus

Item: Elimination of question five, finding three.

Those favoring felt the information in this draft finding would be adequately reflected in other portions of the report.

Vote 8 5-8

Item: Reconsider question one, finding five.

Those favoring wanted to revisit the question of whether language on Divisions II and III should be removed.

Those opposing felt that this question had already adequately been handled.

Vote 9 12-1

Item: Modify language of draft recommendation one.

Those favoring wanted to add language reflecting the Department of Education's commitment to eliminating discrimination.

Those opposing felt the current language was adequate.

Vote 10 12-1

Item: Amending language of draft recommendation two.

Those favoring believed some recommendation language would be better placed in the description of draft recommendation three.

Those opposing felt the current language was adequate.

Vote 11 12-1

Item: Adopting, with rewording and rearrangement, draft recommendation 8 (currently recommendation 8).

Those favoring believed the draft recommendation was adequate with the first sentence added to the explanation, without the language referring to "bully pulpits" and without language referring to an entity outside the NCAA.

Those opposed believed that an antitrust exemption for college athletics would be inappropriate.

Vote 12 6-8

Item: Adopting recommendation nine (b) which would encourage the repeal of the Equity in Athletics Disclosure Act.

Those favoring believed that the EADA report is overly burdensome, subjective and, cumbersome and that the Act should be repealed.

Those opposing believed that the report could provide helpful information to consumers.

Vote 13 10-3

Item: Adopting draft recommendation eleven (b) (currently recommendation 12).

Those favoring believed that the current Office for Civil Rights guidelines on sports-specific private funding are not adequately understood by the general public.

Those opposing believed that more than education of current policy is necessary and that revision of current guidelines may be appropriate.

Vote 14 10-2-1

Item: Maintain draft recommendation eleven (a) as written (currently recommendation 11).

Those favoring believed the Office for Civil Rights ought to be allowed to explore ways in which its regulations regarding outside funding of specific teams might be adjusted to prevent the loss of teams.

Those opposing believed that to allow the Office for Civil Rights to revisit this question might lead to an exemption of such funding even if it is directed only to a team of one sex.

Vote 15 7-7

Item: Adopt draft recommendation 13 with amended language.

Those supporting believed that the Secretary of Education should consider the possibility of allowing institutions to comply with the first part of the three-part test by showing that they divide resources and participation opportunities equally between men and women.

Those opposing felt that the recommendation would lead to limitations on the participation opportunities available to men and women.

Vote 16 0-14

Item: Adopt draft recommendation 14, which would have allowed schools to demonstrate compliance with Title IX by showing that the male/female ratio at the school was proportional to the male/female ratio of athletic participation at the secondary level.

Those opposing believed that the recommendation would result in limiting college athletic participation to the rates in existence at the secondary level without providing any incentive for increasing opportunities at that level.

Vote 17 4-11

Item: Adopt amended draft recommendation 15 which would have precluded the Office for Civil Rights from using any numerical formula for determining compliance with Title IX.

Those favoring believed that the use of numerical formulas for establishing compliance with Title IX violates the express language of the statute forbidding quotas, the Fourteenth Amendment to the U.S. Constitution and fundamental principles of fairness.

Those opposing believe that numerical formulas are necessary to prod educational institutions to comply with Title IX.

Vote 18 7-8

Item: Adopt draft recommendation 19 which would have allowed the Office for Civil Rights to explore the use of regular interest surveys on a continuous basis as a way of allowing schools to demonstrate compliance with Title IX.

Those favoring believed that the Office for Civil Rights should be able to explore the use of interest surveys to demonstrate compliance with Title IX.

Those opposing believed that since interest levels change, interest surveys could never adequately capture student interest in athletics.

Vote 19 6-9

Item: Amendment to draft recommendation 20 to limit its effect to part three of the three-part test.

Those favoring wanted to limit the use of interest surveys to establish compliance with part three of the three-part test.

Those opposing wanted to preserve for the Office for Civil Rights the opportunity to determine whether the use of interest surveys might be feasible in allowing schools to demonstrate compliance with the three-part test.

Vote 20 10-5

Item: Adopt draft recommendation 20 (currently recommendation 18).

Those favoring wanted to preserve for the Office for Civil Rights the opportunity to determine whether the use of interest surveys might be feasible in allowing schools to demonstrate compliance with the three-part test.

Those opposing believed that since interest levels change, interest surveys could never adequately capture student interest in athletics.

Vote 21 15-0

Item: Adopt recommendation 15(b) with amended language (currently recommendation 14).

Those favoring believe that a reasonable variance in proportionality is appropriate for demonstrating compliance with the first part of the three-part test.

Vote 22 10-3

Item: Adopting draft recommendation 16 as amended (currently recommendation 15).

Those favoring believed the Office for Civil Rights should be able to consider giving educational institutions an alternative way of demonstrating compliance with the first part of the three-part test.

Those opposing believed that schools have no reason for not filling available slots on teams, so their failure to do so should not be taken into consideration in determining whether they can demonstrate proportionality.

Vote 23 5-8

Item: Close debate on draft recommendation 18.

Those favoring believed that the Commission could adequately resolve the question of whether the Department of Education should allow educational institutions autonomy in determining how they treat walk-on athletes.

Those opposing felt that more discussion was needed to clarify the definition of walk-on athletes and other matters.

Vote 24 9-4

Item Adopting draft recommendation 22 (currently recommendation 20).

Those favoring believed that educational institutions should be able to demonstrate compliance with Title IX without reference to nontraditional students who are highly unlikely to participate in athletics.

Those opposing believed it was inappropriate to assume that any group (i.e. middle aged students) would not be as likely to participate in athletics as any other.

Vote 25 8-5

Item: Adopting draft recommendation 18 (currently recommendation 17).

Those favoring believed that institutions should be able to decide how to treat walk-on athletes without fear of violating Title IX.

Those opposing believed that because walk-on athletes receive some institutional resources, they should be treated the same as other athletes.

Vote 26 12-1

Item: Adopting new recommendation (draft recommendation 25, currently recommendation 23).

Those favoring believed that the changing demographics of higher education and athletic participation may eventually necessitate new ways of demonstrating compliance with Title IX.

Those opposing believed that current enforcement is completely adequate.

U.S. Department of Education
Office of Educational Research and Improvement (OERI)
National Library of Education (NLE)
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